

# UNITED STATES INTERNATIONAL TRADE COMMISSION

## Investigations Nos. 701-TA-374 and 731-TA-780 (Preliminary)

### BUTTER COOKIES IN TINS FROM DENMARK

#### DETERMINATIONS

On the basis of the record<sup>1</sup> developed in the subject investigations, the United States International Trade Commission determines,<sup>2</sup> pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. §§ 1671b(a) and 1673b(a)), that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of imports from Denmark of butter cookies in tins, provided for in subheading 1905.30.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be subsidized by the Government of Denmark and the European Union and sold in the United States at less than fair value (LTFV).

#### BACKGROUND

On February 6, 1998, a petition was filed with the Commission and the Department of Commerce by the Hearthside Baking Company, Inc. (D/B/A Maurice Lenell Cooky Company), Chicago, IL, alleging that an industry in the United States is materially injured and threatened with material injury by reason of subsidized and LTFV imports of butter cookies in tins from Denmark. Accordingly, effective February 6, 1998, the Commission instituted countervailing duty investigation No. 701-TA-374 (Preliminary) and antidumping investigation No. 731-TA-780 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of February 17, 1998 (63 FR 7828). The conference was held in Washington, DC, on February 27, 1998, and all persons who requested the opportunity were permitted to appear in person or by counsel.

---

<sup>1</sup> The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

<sup>2</sup> Vice Chairman Bragg dissenting.

## **UNITED STATES INTERNATIONAL TRADE COMMISSION**

Investigations Nos. 701-TA-374 and 731-TA-780 (Preliminary)

### **BUTTER COOKIES IN TINS FROM DENMARK**

---

#### **DETERMINATIONS**

On the basis of the record<sup>1</sup> developed in the subject investigations, the United States International Trade Commission determines,<sup>2</sup> pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. §§ 1671b(a) and 1673b(a)), that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of imports from Denmark of butter cookies in tins, provided for in subheading 1905.30.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be subsidized by the Government of Denmark and the European Union and sold in the United States at less than fair value (LTFV).

#### **BACKGROUND**

On February 6, 1998, a petition was filed with the Commission and the Department of Commerce by the Hearthside Baking Company, Inc. (D/B/A Maurice Lenell Cooky Company), Chicago, IL, alleging that an industry in the United States is materially injured and threatened with material injury by reason of subsidized and LTFV imports of butter cookies in tins from Denmark. Accordingly, effective February 6, 1998, the Commission instituted countervailing duty investigation No. 701-TA-374 (Preliminary) and antidumping investigation No. 731-TA-780 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of February 17, 1998 (63 FR 7828). The conference was held in Washington, DC, on February 27, 1998, and all persons who requested the opportunity were permitted to appear in person or by counsel.

---

<sup>1</sup> The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

<sup>2</sup> Vice Chairman Bragg dissenting.



## UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigations Nos. 701-TA-374 and 731-TA-780 (Preliminary)

### BUTTER COOKIES IN TINS FROM DENMARK

---

#### VIEWS OF THE COMMISSION

Based on the record in these investigations, we find that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of butter cookies in tins from Denmark that allegedly are subsidized and sold in the United States at less than fair value (“LTFV”).<sup>1 2</sup>

#### I. COMMISSION’S VIEWS ON DOMESTIC LIKE PRODUCT AND INDUSTRY

##### A. In General

To determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of the subject imports, the Commission first defines the “domestic like product” and the “industry.”<sup>3</sup> Section 771(4)(A) of the Tariff Act of 1930 as amended (“the Act”) defines the relevant industry as the “producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.”<sup>4</sup> In turn, the Act defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation.”<sup>5</sup>

---

<sup>1</sup> Vice Chairman Bragg determines that an industry in the United States is threatened with material injury by reason of the allegedly subsidized and LTFV imports. *See* Dissenting Views of Vice Chairman Bragg.

<sup>2</sup> In reaching our determinations, we have been mindful of the legal standard for preliminary antidumping and countervailing duty determinations, which requires the Commission to determine, based upon the information available at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured, or threatened with material injury, by reason of the allegedly subsidized and LTFV imports. 19 U.S.C. § 1673b(a); *see also* American Lamb Co. v. United States, 785 F.2d 994 (Fed. Cir. 1986); Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994); Calabrian Corp. v. United States, 794 F. Supp. 377, 381 (Ct. Int’l Trade 1992). American Lamb 785 F.2d at 1001.

<sup>3</sup> 19 U.S.C. § 1677(4)(A).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at § 1677(10).

Our decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of “like” or “most similar in characteristics and uses” on a case-by-case basis.<sup>6</sup> No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.<sup>7</sup> The Commission looks for clear dividing lines among possible like products, and disregards minor variations.<sup>8</sup> Although the Commission must accept the determination of Commerce as to the scope of the imported merchandise allegedly subsidized and sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.<sup>9</sup>

Notwithstanding respondents’ reliance on the Commission’s determination in a 1980 investigation involving butter cookies from Denmark,<sup>10</sup> the Commission is not bound by prior determinations concerning similar imported products.<sup>11</sup> Rather, the Commission based its domestic like product determination on the record in these investigations.

## **B. Product Description**

In its notice of initiation, Commerce defined the imported merchandise within the scope of these investigations, as:

*Flat baked sweet biscuits made from a mixture of ingredients which may include, but are not limited to butter, flour, eggs, and sugar. As defined by the U. S. Food and Drug Administration Compliance Policy Guide 7102.06, Chapter 5, Sec. 505.200, butter cookies are distinguishable from all other cookies in that "all of the shortening ingredient is butter." The butter cookies covered by these investigations are only those in hard containers ("tins"), which include, but are*

---

<sup>6</sup> See, e.g., Nippon Steel Corp. v. United States, 19 CIT \_\_\_, Slip Op. 95-57 at 11 (Apr. 3, 1995). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. See Nippon Steel at 11, n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int’l Trade 1996).

<sup>7</sup> See, e.g., S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979).

<sup>8</sup> Torrington Co. v. United States, 747 F. Supp. 744, 748-49 (Ct. Int’l Trade 1990), *aff’d*, 938 F.2d 1278 (Fed. Cir. 1991).

<sup>9</sup> Hosiden Corp. v. Advanced Display Manufacturers, 85 F.3d 1561 (Fed. Cir. 1996) (Commission may find a single like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-752 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

<sup>10</sup> Butter Cookies from Denmark, Inv. No. 701-TA-51 (Final), USITC Pub. 1077 (June 1980).

<sup>11</sup> Nippon Steel, Slip Op. 95-57 at 11; Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1088 (Ct. Int’l Trade 1988).

*not limited to, those that are made of metal, and are round, printed with colorful decorative logos and/or pictures, and which have closeable lids.<sup>12</sup>*

---

<sup>12</sup> *Initiation of Antidumping and Countervailing Duty Investigations: Butter Cookies in Tins from Denmark*, U.S. Department of Commerce, 63 Fed. Reg. 10822/23 (March 5, 1998).

In the preliminary phase of these investigations, Chairman Miller defines the like product as all cookies in tins, and finds no reasonable indication that the domestic industry producing cookies in tins is materially injured or threatened with material injury by reason of the subject imports. Commissioner Crawford defines the like product as all cookies, and finds no reasonable indication that the domestic industry producing cookies is materially injured or threatened with material injury by reason of subject imports.<sup>13</sup> Their separate views concerning like product, domestic industry and no reasonable indication of material injury by reason of the subject imports follow. Their joint views of no reasonable indication of threat of material injury by reason of the subject imports follow their separate views.

## **II. VIEWS OF CHAIRMAN MARCIA E. MILLER**

On the basis of the information obtained in these preliminary investigations, I determine that there is no reasonable indication that an industry in the United States producing cookies in tins is materially injured or threatened with material injury by reason of imports of butter cookies in tins from Denmark that allegedly are subsidized and sold in the United States at less than fair value (“LTFV”). I join the Commission majority decision on standard of review in preliminary determinations, on the background and product description sections of the like product and domestic industry discussion, and on no threat of material injury. My analysis of the like product and domestic industry, and my discussion of no material injury to that industry follows.

### **A. Like Product and Domestic Industry**

In my consideration of the appropriate like product in these investigations, I address two central questions, whether butter cookies are distinct from all cookies, and whether cookies in tins are distinct from cookies otherwise packaged.<sup>14</sup> Taking into account the six factors traditionally considered by the Commission, I determine that the domestic product that is like the subject imports, butter cookies in tins, consists of all cookies in tins.

#### **1. Butter Cookies Compared to All Cookies**

The first factor generally considered by the Commission in its like product analysis is physical characteristics. There is some basis for distinguishing butter cookies in this regard. Butter cookies differ from other cookies in that the shortening ingredient is 100 percent butter. However, on that basis, nearly every variety of cookie could be argued to have a distinct flavor component. For example, a chocolate cookie contains chocolate and an oatmeal cookie contains oatmeal, ingredients not shared by all cookies. Many more ingredients, such as flour or sugar, are common to all cookies, notwithstanding a difference in the flavoring component.

---

<sup>14</sup> Petitioner argued that the like product should be defined coextensive with the scope, limited to butter cookies in tins. Petitioner's Postconference Brief at 7-22. Respondents argued for a broader like product, encompassing all cookies. Respondents' Postconference Brief at 1.

With respect to other factors traditionally considered by the Commission, I find no distinction between butter and all other cookies.

The primary end use of a cookie is consumption as a snack or dessert item. For this purpose, interchangeability essentially exists across all types of cookies. The vast majority of cookies, whether butter or not, are sold through retail grocery stores, largely supplied by local distributors.<sup>15</sup> Some producers, such as the petitioner, also sell their butter cookies through drug chains, wholesale/warehouse chains, discount drug chains, and mass merchants; other cookies are also found in these same channels of distribution. Butter cookies and non-butter cookies are produced at the same facilities, on the same production lines, using the same processes, equipment, and employees. Although the choice of any particular type of cookie may reflect the individual preferences of the consumer, there is no evidence that producers' or consumers' perceptions create any type of clear dividing line to distinguish butter cookies from other cookies. Finally, prices for cookies vary widely, and depend upon a variety of factors, perhaps most importantly brand recognition. Name-brand, vegetable shortening cookies sold in bags typically sell at the same or higher prices than certain butter cookies, while off-brand non-butter cookies may be priced below butter cookies.<sup>16</sup>

Based on this analysis, I do not find a sufficient dividing line to distinguish butter cookies from all other cookies. All cookies share a number of common ingredients, and many types may have distinguishing flavor characteristics, such as the shortening or chocolate flavoring. All cookies share the same end uses, are interchangeable, are sold through similar channels of distribution, and are produced in common production facilities, using common processes and employees. Prices vary widely, depending on factors such as name-brand recognition, and there is no indication that butter cookies are consistently priced differently than any other type of cookie.

## **2. Cookies in Tins Compared to Cookies Not in Tins**

Having determined that no clear dividing line exists between butter and all other cookies, I next address whether cookies packaged in tins are a distinct product, as argued by the petitioner. As compared to cookies otherwise packaged, cookies in tins are offered in a unique packaging form that generally creates a distinctive look for the final cookie product and provides a longer shelf life for the cookies.<sup>17</sup> Cookies in tins are purchased primarily as gift items or for the decorative nature of the tin. The record indicates that the primary end use for cookies in tins is distinguished from cookies otherwise packaged in that they are seasonal items. The vast majority of consumer sales of cookies in tins occurs during the holiday season.<sup>18</sup> That the predominant end use of cookies in tins is for seasonal gift-giving limits the interchangeability of these cookies

---

<sup>15</sup> Confidential Report ("CR") at I-14, III-6-7; Public Report ("PR") at I-12, III-5.

<sup>16</sup> CR at I-14, PR at 12.

<sup>17</sup> CR at I-12, PR at I-10, Transcript of Conference, February 27, 1998 ("Tr") at 60-61. Petitioner suggests that, in this respect, this case is analogous to cases in which the Commission has narrowly defined the like product to consist of only of a canned food product. Petitioner's Postconference Brief at 12-13. *See, e.g., Canned Pineapple Fruit from Thailand*, Inv. No. 731-TA-706 (Preliminary), USITC Pub. 2798 at I-6-7.

<sup>18</sup> CR at Table V-1 and V-9, PR at Table V-1 and V-6 (Statement that Little Dutch Boy sold 1-pound tins of butter cookies \*\*\*).



with cookies not packaged in tins. It is unlikely that a consumer would substitute cookies packaged in a cellophane wrapper or a paper bag if the intended purpose is for a gift.

Channels of distribution differ somewhat based on packaging. Cookies in tins are sold nationally to distributors, retailers, and wholesalers such as drug chains, wholesale/warehouse clubs, discount drug chains, and mass merchants.<sup>19</sup> In contrast, the predominant channel of distribution for cookies not in tins is through retail grocery stores.<sup>20</sup> Petitioner does not sell any butter cookies in tins to grocery chains.<sup>21</sup>

Cookies packed in tins are produced at the same facilities, on the same production lines, using generally the same processes, equipment, and employees as cookies otherwise packaged. For example, petitioner produces cookies regardless of the ultimate packaging in its plant in Chicago. However, packaging of cookies into tins requires additional labor and costs. Also, cookies in tins are hand-packed using specially trained labor.<sup>22</sup> The petitioner hand packages all of its butter cookies in tins, and approximately \*\*\* percent of its 2-pound “holiday bear” tins of vegetable shortening cookies are hand packed in paper holders.<sup>23</sup>

As noted above, cookies in tins are perceived by producers and consumers as seasonal items, often purchased as a gift or as a collectible.<sup>24</sup> In contrast, cookies in other forms of packaging, including butter cookies such as Pepperidge Farm’s Chessman, are perceived by producers and customers as strictly food items and generally would not be considered a suitable gift.<sup>25</sup>

As noted in the previous section, prices for cookies, as a general matter, fluctuate widely depending upon a variety of factors. Notwithstanding the added cost and value of the tins, name-brand vegetable-shortening cookies sold in bags typically sell at the same or higher prices than cookies sold in tins.<sup>26</sup> For example, Pepperidge Farm’s average price per pound of its butter cookies in bags is \*\*\* percent greater than the average price per pound of U.S.-produced butter cookies in tins.<sup>27</sup> In other cases, cookies in tins sell for higher prices than off-brand artificial-butter-flavored cookies sold in cellophane trays or paper boxes.<sup>28</sup> Cookies in tins usually are sold at similar and standard “price points” -- \$2.99 per tin, or two for \$5.00, at the retail level.<sup>29</sup>

---

<sup>19</sup> CR at I-13, PR at I-12.

<sup>20</sup> CR at I-14 and III-6-7, PR at I-12 and III-5.

<sup>21</sup> CR at I-13, PR at I-12.

<sup>22</sup> CR at I-12, PR at I-11, Transcript of Commission meeting, March 20, 1998 at 5-7. The packing process for some cookies requires that each cookie be placed into cups containing several individual cookies and packed into a metal container. A paper circle is inserted over the cup cookies, a metal lid is applied and sealed, and a shrink wrap is applied. This process substantially adds to the cost of producing some cookies in tins. CR at VI-8-9, PR at V-6.

<sup>23</sup> CR at I-11, n. 49, PR at I-10, n. 49.

<sup>24</sup> CR at I-13, PR at I-11.

<sup>25</sup> Id.

<sup>26</sup> CR at I-14, PR at I-12.

<sup>27</sup> CR at V-8, PR at V-6.

<sup>28</sup> CR at I-14; PR at I-12.

<sup>29</sup> Id.

Based on this analysis, I determine that a clear dividing line does exist between cookies in tins and cookies not packaged in tins. The packaging of cookies in tins requires additional labor and costs, and imparts certain physical characteristics, including longer shelf life and aesthetics, that affect producer and consumer perceptions. These in turn distinguish cookies in tins as gift items rather than strictly food items. These differences are further reflected in the mostly distinct channels of distribution and types of stores in which they are sold, and in the established low-margin price points that end users expect to pay for this product. Interchangeability between cookies in tins and those not in tins is limited by the degree to which cookies in tins are purchased as gift items rather than for household consumption. I find that these factors outweigh the commonality in the production processes and employees used for cookies packed in tins and other cookies.<sup>30</sup>

Accordingly, I conclude that the domestic like product in these investigations includes all cookies in tins. The Commission is directed to consider the impact of the subject imports on the domestic industry, defined as “the producers as a [w]hole of a domestic like product.”<sup>31</sup> Based on my domestic like product definition, I define the corresponding domestic industry as all domestic producers of cookies in tins.<sup>32</sup>

---

<sup>30</sup> The packaging-based distinctions in these investigations are unusual, in that the cost and labor associated with the process of packaging, and the distinct physical characteristics, end uses, and customer perceptions, create a clear dividing line. My like product determination in these investigations should not be read to signal any type of generic acceptance of the notion that packaging by itself is sufficient to warrant like product distinctions.

<sup>31</sup> 19 U.S.C. § 1677(4)(A).

<sup>32</sup> The members of the domestic industry who replied to the Commission questionnaire include Maurice Lenell, Little Dutch Boy, and Boca Foods, Inc., D/B/A Century Cookies. See Generic Cephalexin Capsules from Canada, Inv. No. 731-TA-423 (Final), USITC Pub. 2211 (Aug. 1989) at 11-12 (inclusion in domestic industry of firms that import bulk cephalexin and process it into oral dosage forms); Certain Cased Pencils from Thailand, Inv. No. 731-TA-670 (Final), USITC Pub. 2816 (Oct. 1994) at I-7-9 (inclusion in domestic industry of firm that decorated and finished imported raw pencils).

## **B. No Reasonable Indication of Material Injury by Reason of Allegedly Subsidized and LTFV Imports from Denmark**

In preliminary antidumping and countervailing duty investigations, the Commission determines whether there is a reasonable indication that an industry in the United States is materially injured by reason of the imports under investigation.<sup>33</sup> In making these determinations, the Commission must consider the volume of imports, their effect on prices for the domestic like product, and their impact on regional producers of the domestic like product, but only in the context of U.S. production operations.<sup>34</sup>

In assessing whether there is a reasonable indication that the domestic industry is materially injured by reason of allegedly subsidized or LTFV imports, the Commission considers all relevant economic factors that bear on the state of the industry in the United States.<sup>35</sup> These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."<sup>36</sup>

For the reasons discussed below, I determine that there is no reasonable indication that the domestic industry producing cookies in tins is materially injured by reason of allegedly subsidized and LTFV imports of butter cookies in tins from Denmark.

### **1. Conditions of Competition**<sup>37</sup>

Imports of Danish butter cookies in tins have a long and well established presence in the U.S. cookie market. Over the period of investigation, imports from Denmark accounted for an average 89.8 percent of the U.S. market.<sup>38</sup> In 1994, petitioner Maurice Lenell and Little Dutch Boy, both well established cookie producers, entered the market for butter cookies in tins.

---

<sup>33</sup> 19 U.S.C. §§ 1671b(a)(1) and 1673b(a)(1). The statute defines "material injury" as "harm which is not inconsequential, immaterial or unimportant." 19 U.S.C. § 1677(7)(A).

<sup>34</sup> 19 U.S.C. § 1677(7)(B)(I). The Commission "may consider such other economic factors as are relevant to the determination" but shall "identify each [such] factor . . . and explain in full its relevance to the determination." 19 U.S.C. § 1677(7)(B).

<sup>35</sup> 19 U.S.C. § 1677(7)(C)(iii).

<sup>36</sup> *Id.*

<sup>37</sup> Subject imports accounted for virtually all butter cookies in tins imported into the United States in 1997. CR at Tables IV-1, PR at Table IV-1. Consequently, negligibility is not an issue.

<sup>38</sup> CR at Table IV-3 and Table IV-4, PR at Table IV-3 and Table IV-4.

Although cookies in tins are manufactured and sold year-round, the preponderance of retail level sales occurs during the fourth quarter, as these products are purchased largely for gift-giving, especially during the holiday season.<sup>39</sup> The shipment figures for both the domestic and imported products confirms that the vast majority of these items are shipped in the last two quarters of the year.<sup>40</sup>

Consumption of all cookies in tins increased by 21 percent during the investigation period. Much of this increase reflects the growing number of wholesale/warehouse club stores and drug store chains, larger holiday inventories, and additional advertising by the retailers. Importers stated that warehouse clubs are becoming more important and that they request larger tin sizes.<sup>41</sup> Historically, the subject cookies imported from Denmark have been butter cookies packaged in 16-ounce tins. The U.S. producers stated that they do not produce butter cookies in tins larger than 16-18 ounces, because it is not cost effective for them given the high cost of butter.<sup>42</sup>

## **2. Volume of Subject Imports**

Imports of butter cookies in tins from Denmark have generally held a sizeable, but relatively constant, share of the U.S. market for cookies in tins. In 1995, 1996, and 1997, the volume of shipments of subject imports was \*\*\* pounds, \*\*\* pounds, and \*\*\* pounds, respectively.<sup>43</sup> The value of U.S. shipments of subject imports was \*\*\* in 1995, \*\*\* in 1996, and \*\*\* in 1997.<sup>44</sup> The volume share of apparent consumption for the cookies in tins market held by these imports was \*\*\* percent in 1995, \*\*\* percent in 1996, and \*\*\* percent in 1997.<sup>45</sup> By value, subject imports' market share was \*\*\* percent in 1997, \*\*\* percentage points lower than the \*\*\* percent market share held in 1995.<sup>46</sup>

In light of these high market shares, I consider the volume of subject imports to be significant. However, given the size of the subject imports initial presence in the market, I do not consider the increases during the period to be significant, either in relative or absolute terms.

---

<sup>39</sup> Petitioner's Postconference brief at 13-15; Tr. at 114.

<sup>40</sup> CR at I-9, n. 37 and Table V-1, PR at I-8, n. 37 and Table V-1. These figures represent producers' shipments to retailers. Petitioner indicated that the commitments for the holiday season are secured early in the year, with the actual shipments occurring in the third and fourth quarters. CR at I-9, PR at I-8. Petitioner indicated that "seasonality" is measured at the retail level, so third quarter producer shipments could likely be of products that will be sold to the end consumer during the fourth quarter. Tr. at 139-140.

<sup>41</sup> CR at II-6, PR at II-4.

<sup>42</sup> CR at V-2, PR at V-2.

<sup>43</sup> CR at Table C-5 and Table IV-3, PR at Table C-5 and Table IV-3.

<sup>44</sup> *Id.* The volume and value of subject imports showed the same trends as U.S. shipments of subject imports. CR at Table IV-1, PR at Table IV-1. By volume, subject imports declined from \*\*\* pounds in 1995 to \*\*\* pounds in 1996, and then rose to \*\*\* pounds in 1997. The value of subject imports was \*\*\* in 1995, \*\*\* in 1996, and \*\*\* in 1997.

<sup>45</sup> CR at Table C-5, PR at Table C-5.

<sup>46</sup> *Id.*

### **3. Price Effects of Subject Imports**

In these investigations, the Commission obtained producer and importer pricing data that enabled it to make price comparisons for sales of butter cookies in 16- and 18-ounce tins -- the only sales for which the domestic producers and the importers compete head-to-head. The parties agreed that the domestic and imported products are highly substitutable and that price is the driving force in a sale.<sup>47</sup>

The record reveals that, in every quarter from January 1995 through March 1997, the imported product consistently was priced above the domestic product by margins ranging from 17.9 percent to 38.9 percent.<sup>48</sup> The prices for the imported product generally increased through the first quarter of 1997, despite being priced above the competing domestic product. For the last three quarters of 1997, the price of the imported product declined somewhat, thereby underselling the domestic product by margins of 6.8 percent, 3.1 percent, and 3.1 percent, respectively. The underselling occurred, however, in the context of a significant increase in the price of the domestic product. Therefore, I do not find the underselling to be significant.

Nor do I find that the subject imports have depressed or suppressed prices for the domestic products. The U.S.-produced butter cookies in tins entered the market at prices substantially below those of the imported product, and continued to undersell the imports by large margins for slightly more than two years. U.S. producers sold their product for prices ranging from \*\*\* to \*\*\*, while the comparable imported product was sold for prices ranging from \*\*\* to \*\*\*. In no quarter during that two-year period did the U.S. and import prices come within \*\*\* of each other. Because subject imports consistently oversold the domestic product by large margins during 1996, I find no basis for concluding that subject imports suppressed domestic price increases in that year, as argued by petitioner.

Moreover, even in the third and fourth quarters of 1997, when the imported product undersold the domestic butter cookies in tins, the domestic producers of cookies in tins were able to sustain a significant price increase as compared to the same period in 1996, to \*\*\*, albeit at a lower volume than during the comparable quarters in 1996.<sup>49</sup> This price increase occurred during the time in which petitioner alleges that subject imports depressed prices or prevented price increases that otherwise would have occurred, and in the context of a reduction in costs as a result of lower prices for a primary input.<sup>50</sup>

Although the domestic producers alleged lost sales and revenues to the subject imports, their allegations were not specific, in that \*\*\*.<sup>51</sup> These allegations were generally not confirmed by the purchasers.<sup>52</sup>

---

<sup>47</sup> Tr. at 15, 24, 27-29 (testimony of Messrs Levine and T. Cohen) and Petitioner's Post-Conference Brief at 45-46; Tr. at 113 (testimony of Mr. Norgaard).

<sup>48</sup> CR at Table V-1; PR at Table V-1.

<sup>49</sup> I do not find that the second quarter 1997 price increase to \*\*\* provides an appropriate point of comparison because of the seasonal nature of the sales of cookies in tins.

<sup>50</sup> See CR at Table C-5; PR at Table C-5.

<sup>51</sup> CR at V-13 and Table V-2, PR at V-10 and Table V-2, Petition Exhibit 24. \*\*\*.

<sup>52</sup> CR at V-13-15; PR at V-11.

In light of the evidence discussed above, I do not find a reasonable indication that the subject imports are suppressing or depressing prices to a significant degree.

#### **4. Impact of Subject Imports**<sup>53</sup>

I do not find that subject imports of butter cookies in tins from Denmark are having a significant impact on the domestic industry producing cookies in tins. In 1994, the petitioner decided to enter the market for butter cookies in tins, after concluding that high prevailing prices of the imported Danish product and the absence of significant domestic competition presented an excellent business opportunity for an otherwise established producer of cookies, including other cookies in tins. Recognizing that price would be important to winning market share, petitioner initially offered an 18-ounce product to compete with the imported 16-ounce tin, for a price far below the prevailing price for subject imports from Denmark. The petitioner then planned in 1997 to reduce the volume of cookies in its tins to 16 ounces and increase the price.<sup>54</sup>

The domestic industry began the investigation period in a relatively weak financial condition.<sup>55</sup> In 1995 and 1996 the industry reported \*\*\*. In 1997, the industry's overall financial performance improved, with \*\*\*.<sup>56</sup>

---

<sup>53</sup> As part of its consideration of the impact of imports, the statute as amended by the Uruguay Round Agreements Act (URAA) specifies that the Commission is to consider "the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V). The SAA indicates that the amendment "does not alter the requirement in current law that none of the factors which the Commission considers is necessarily dispositive in the Commission's material injury analysis." SAA at 850. New section 771(35)(C), 19 U.S.C. § 1677(35)(C), defines the "margin of dumping" to be used by the Commission in a preliminary determination as the margin or margins published by Commerce in its notice of initiation. In these investigations, although petitioner alleged dumping margins ranging from 42 to 83 percent, Commerce did not identify the magnitude of estimated dumping margins. Given that Commerce has not provided estimated margins, I do not have a solid basis upon which to consider the margins. In any event, given the lack of significant price effects by the subject imports, I find that even the magnitude of the dumping margins as alleged by petitioner does not have a significant bearing on the state of the industry in this case.

<sup>54</sup> Petition at 27, and Tr. at 15-17 (testimony of Mr. Levine).

<sup>55</sup> CR at Table C-5; PR at Table C-5.

<sup>56</sup> While wages declined and productivity increased during the period of investigation, the industry's workforce was reduced by \*\*\* percent. CR at Table C-5; PR at Table C-5.

Although production and domestic shipments were lower in 1997 than in 1996, they remained higher than in 1995. As such, production and domestic shipments increased overall during the period of investigation. The unit value of domestic shipments, after falling from \*\*\* in 1995 to \*\*\* in 1996, recovered in 1997 to \*\*\*.<sup>57</sup>

The industry's improvement in 1997 coincides with the period in which Commission data shows prices of the subject imports falling and those of the comparable domestic product rising. Thus, the industry improved its financial performance during the one year in which there is evidence of some underselling by the subject imports. I have found that the subject imports did not have significant price effects on the domestic industry. The lack of any significant correlation between the subject imports' prices and the condition of the domestic industry is further confirmed by the inverse relationship between the industry's performance and subject import pricing.

Likewise, the industry data indicate that the volume of subject imports, although significant, did not have an adverse impact on the industry's performance. The industry's worst year financially was 1996, the year in which the subject import's presence in the market was at its period low, both in absolute terms and by market share. In 1996, subject imports' market share by value dropped to \*\*\* percent from the \*\*\* percent they held in 1995; subject import's market share by volume dropped to \*\*\* percent from the \*\*\* percent they held in 1995. Concurrent with the subject imports' loss of market share, the domestic industry gained market share in 1996, increasing to \*\*\* percent by value, from \*\*\* percent in 1995, and to \*\*\* percent by volume, from \*\*\* percent in 1995. Yet, despite the loss of subject import market share and gain of domestic industry market share in 1996, the industry experienced its weakest financial performance of the period investigated. Even though production and U.S. shipments peaked that year, the industry reported \*\*\*. The evidence indicates that these \*\*\* resulted from \*\*\*.<sup>58</sup> As noted, there is no indication that the industry's poor 1996 financial performance was by reason of the subject imports, which were at their period low during that year.

In sum, because I do not find that the subject imports are having significant price effects, and because I do not find a correlation between the industry's financial performance and the volume and prices of the imports, I determine that the domestic industry producing cookies in tins is not materially injured by reason of the subject imports.

---

<sup>57</sup> CR at Table C-5; PR at Table C-5.

<sup>58</sup> CR at Table C-5 and VI-2; PR at Table C-5 and VI-2.

### III. VIEWS OF COMMISSIONER CAROL T. CRAWFORD

On the basis of the information obtained in these preliminary investigations, I determine that there is no reasonable indication that the industry in the United States producing cookies is materially injured or threatened with material injury by reason of imports of butter cookies in tins from Denmark that allegedly are subsidized and sold in the United States at less than fair value ("LTFV"). I join the Commission majority in the discussion of product description and in determining that there is no reasonable indication that an industry in the United States is threatened with material injury by reason of the subject imports. However, my definition of like product differs from my colleagues' definitions. Therefore, my separate views concerning the like product, domestic industry, and no reasonable indication of material injury by reason of the subject imports follow.

#### A. Like Product and Domestic Industry

I determine that the domestic like product is all cookies, and that the relevant domestic industry consists of all U.S. producers of cookies. In my view, the key question is whether a product's packaging is an appropriate basis for defining the like product. In these investigations, the question is whether the packaging, *i.e.*, the tin, creates a clear dividing line between cookies in tins and other cookies.

The first step is to distinguish between packaging and processing. Here, domestic cookie producers are not further "processing" a product. Rather, the cookies themselves are finished products that remained unchanged whether they are packaged in tins, boxes, or other forms of packaging. Packaging the cookies in tins does not transform the cookies in any way. As such, the facts on this record are distinguished from other investigations in which the Commission found separate like products where significant and extensive additional operations were required to further process an upstream product into a downstream product.<sup>59</sup> Here, the tins are a form of packaging, not further processing, of the cookies.<sup>60</sup>

The second step is to evaluate the focus of these investigations, that is, whether the Commission's investigations concern the cookies or the tins. Petitioner and the other domestic companies that reported packaging cookies in tins are in the business of baking cookies. Record evidence indicates that these companies produce butter cookies that they subsequently package in tins. According to petitioner, the firms do not produce the tins, but rather purchase tins that are produced mainly in \*\*\*.<sup>61</sup> Therefore, it is appropriate for the Commission to focus on the cookies, rather than the tins, in order to define the like product based on what petitioner and the other firms actually produce, *i.e.*, the cookies, rather than what they import, *i.e.*, the tins. Thus, it is not appropriate to define the like product based on the tin. Doing so would

---

<sup>59</sup> *E.g.*, Certain Preserved Mushrooms from Chile, China, India, and Indonesia, Inv. Nos. 731-TA-776-79 (Preliminary), USITC Pub. 3086 (Feb. 1998) at 7 (production required the additional steps of washing, blanching, adding solution, canning sealing, retorting and labeling, all requiring specialized equipment and separate employees); Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany and Japan, Inv. Nos. 731-TA 736 and 737 (Final), USITC Pub. 2988 (Aug. 1996) at 6 n.23.

<sup>60</sup> *See, e.g.*, Certain Compact Ductile Iron Waterworks Fittings and Accessories Thereof from the People's Republic of China, Inv. No. 731-TA-621 (Final), USITC Pub. 2671 (Aug. 1993) at 22-23 (packaging of purchased components insufficient to constitute domestic production.)

<sup>61</sup> CR at V-1, PR at V-1.



create an anomalous situation. The cost of the tins represents a significant portion,\*\*\* percent, of the total cost of the butter cookies in tins. In fact, the cost of the tins is \*\*\* the cost of the cookies.<sup>62</sup> Therefore, since petitioner and the other firms do not produce, but rather import the tins, it would be reasonable to conclude that their production of only cookies is not sufficient to make them "producers" of a like product defined as butter cookies in tins.<sup>63</sup> Consequently, defining the like product based on the tins would have the anomalous result of not including the producers of the cookies in the domestic industry. On the other hand, if these firms were to be included in the domestic industry, then so should producers of the tins, given the relative costs of the cookies and tins.<sup>64</sup>

Finally, applying the Commission's six factor like product test further confirms that the tins do not represent a clear dividing line between cookies packaged in tins and those sold in other forms of packaging. All cookies, no matter how packaged, ultimately have the same end use, that is, to be eaten as a dessert or snack. The cookies themselves are functionally interchangeable as food items, and any cookie can be packaged in a tin or in any other form of packaging. Domestic cookie producers bake the cookies that are ultimately packaged in tins at the same facilities in which they bake other cookies. They also generally use the same production lines, processes, equipment and employees to bake all their cookies. Despite the additional cost of the tin, there is no apparent price correlation reflecting this additional cost. Rather, name-brand cookies sold in bags typically sell at the same or higher prices than cookies sold in tins,<sup>65</sup> while cookies in tins may sell for higher prices than off-brand cookies sold in other forms of packaging such as cellophane trays or paper boxes.<sup>66</sup> The only apparent distinguishing factor between cookies in tins and cookies not in tins is the channels of distribution.<sup>67</sup> However, the differences in channels of distribution are outweighed by identical end uses, interchangeability and production processes. For these reasons I find that the tins do not create a clear dividing line between cookies in tins and cookies not in tins.

Having found that the packaging, *i.e.* the tin, does not establish a clear dividing line between cookies in tins and cookies not in tins, I next examine whether there is a clear dividing line between butter cookies and

---

<sup>62</sup> CR at VI-9; PR at VI-4.

<sup>63</sup> See 19 U.S.C. § 1677(7)(B)(III) (Commission to evaluate impact of subject imports on domestic producers of like products, but "only in the context of production operations within the United States."); Minivans from Japan, Inv. No. 731-TA-522 (Preliminary), USITC Pub. 2402 (July 1991) at 19-25 (Chrysler's Canadian production is not included in the U.S. industry).

<sup>64</sup> See DRAMS of One Megabit and Above from the People's Republic of Korea, Inv. No. 731-TA-556, (Final), USITC Pub. 2629 at 12-16 (Views of the Commission), 40-41 (Dissenting Views of Vice Chairman Watson and Commissioners Brundsale and Crawford) (May 1993) (finding that companies that performed wafer fabrication or wafer assembly in the United States should be included in the domestic industry.)

<sup>65</sup> For example, Pepperidge Farm's average price per pound of its butter cookies in bags is \*\*\* percent greater than the average price per pound of U.S.-produced butter cookies in tins. CR at V-8; PR at V-6.

<sup>66</sup> CR at I-14, PR at I-12.

<sup>67</sup> Cookies in tins generally are sold to distributors, retailers and wholesalers such as drug chains, wholesale/warehouse clubs, discount drug chains and mass merchants. Other cookies generally are sold in supermarkets and other grocery stores. CR at I-13-14; PR at I-12.

other cookies. I find that all cookies represent a continuum of similar products in which there is not a clear dividing line between butter cookies and non-butter cookies.<sup>68</sup>

Along this continuum, different cookies have different physical characteristics. Although butter cookies are distinguished by the shortening ingredient (butter), there are many ingredients, such as flour and sugar, that are common to all cookies. In addition, nearly every variety of cookie has a distinguishing feature, often the flavor. For example, chocolate cookies contain chocolate along with the other ingredients, regardless of the shortening ingredients used, making it difficult to envision a clear dividing line between chocolate butter cookies and chocolate non-butter cookies.

The largest producers of butter cookies sell both these cookies and other cookies predominantly through retail grocery stores.<sup>69</sup> Thus, butter cookies often are sold in the same channels of distribution as other cookies. While some butter cookies usually are sold to distributors, retailers and wholesalers such as drug chains, wholesale/warehouse clubs, discount drug chains and mass merchants,<sup>70</sup> some non-butter cookies also are distributed through those same channels.<sup>71</sup>

Butter cookies and non-butter cookies are produced at the same facilities, on the same production lines, using the same processes, equipment and employees. Although the choice of any particular type of cookie may reflect the individual preferences of the end users, there is no evidence that producers' or consumers' perceptions create a clear dividing line that distinguishes butter cookies from other cookies.

The record demonstrates that there is no clear dividing line between butter cookies and non-butter cookies based on price. As a general matter, the prices for cookies fluctuate widely depending upon a variety of factors, not the least of which is brand recognition. Name-brand vegetable-shortening cookies often sell at the same or higher prices than some butter cookies,<sup>72</sup> while in other cases butter cookies may sell for higher prices than non-butter cookies, particularly off-brand cookies.<sup>73</sup>

Based on the factors discussed above, I conclude that the record does not establish a clear dividing line between butter cookies and non-butter cookies. Although butter cookies are distinguished by their shortening ingredient, all cookies share many common ingredients. Butter cookies and non-butter cookies have the same end uses, are interchangeable, are sold through the same channels of distribution, share common production facilities, processes and employees, and fluctuate in price based upon factors such as

---

<sup>68</sup> In a case such as the present one, where the domestically manufactured merchandise is made up of a continuum of similar products, the Commission does not consider each item of merchandise to be a separate domestic like product that is only "like" its counterpart in the scope, but considers the continuum itself to constitute the domestic like product. Certain Steel Wire Rod from Canada, Germany, Trinidad & Tobago, and Venezuela, Inv. Nos. 701-TA-368-371 (Final), USITC Pub. 3075 at 7 (Nov. 1997).

<sup>69</sup> CR at I-14 and III-6-7, PR at I-12 and III-5.

<sup>70</sup> CR at I-13, PR at I-12.

<sup>71</sup> Tr. at 21-22 and 26.

<sup>72</sup> CR at I-14; PR at I-12.

<sup>73</sup> Id.

brand recognition. Consequently, I conclude that the domestic like product in these investigations consists of all cookies.

The Commission is directed to consider the impact of the subject imports on the domestic industry, defined as “the producers as a [w]hole of a domestic like product.”<sup>74</sup> Based on my finding that the domestic like product consists of all cookies, the domestic industry therefore consists of domestic producers of all cookies.

## **B. Analytical Framework**

In determining whether there is a reasonable indication that a domestic industry is materially injured by reason of the allegedly subsidized and LTFV imports, the statute directs the Commission to consider:

- (I) *the volume of imports of the merchandise which is the subject of the investigation,*
- (II) *the effect of imports of that merchandise on prices in the United States for like products, and*
- (III) *the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States . . .*<sup>75</sup>

In making its determination, the Commission may consider “such other economic factors as are relevant to the determination.”<sup>76</sup> In addition, the Commission “shall evaluate all relevant economic factors which have a bearing on the state of the industry . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>77</sup>

The statute directs that we determine whether there is a reasonable indication of “material injury by reason of the allegedly subsidized and dumped imports.” Thus we are called upon to evaluate the effect of allegedly subsidized and dumped imports on the domestic industry and determine if there is a reasonable indication that they are causing material injury. There may be, and often are, other “factors” that are causing injury. These factors may even be causing greater injury than the alleged subsidies and dumping. However, the statute does not require us to weigh or prioritize the factors that are independently causing material injury. Rather, the Commission is to determine whether there is a reasonable indication that any injury “by reason of” the allegedly subsidized and dumped imports is material. That is, the Commission must determine if there is a reasonable indication that the subject imports are causing material injury to the domestic industry. “When determining the effects of imports on the domestic industry, the Commission must consider all relevant factors that can demonstrate if unfairly traded imports are materially injuring the domestic industry.”<sup>78</sup> It is important, therefore, to assess the effects of the allegedly subsidized and dumped imports in a way that distinguishes those effects from the effects of other factors unrelated to the alleged subsidization and dumping. To do this, I compare the current condition of the industry to the industry conditions that would

---

<sup>74</sup> 19 U.S.C. § 1677(4)(A).

<sup>75</sup> 19 U.S.C. § 1677(7)(B)(i).

<sup>76</sup> 19 U.S.C. § 1677(7)(B)(ii).

<sup>77</sup> 19 U.S.C. § 1677(7)(C)(iii).

<sup>78</sup> S. Rep. No. 71, 100th Cong., 1st Sess. 116 (1987)(emphasis added); Gerald Metals, Inc. v. United States, 132 F.3d 716 (Fed. Cir. 1997).

have existed without the alleged subsidization and dumping, that is, had subject imports all been fairly priced. I then determine whether the change in conditions constitutes material injury.<sup>79</sup>

In my analysis of material injury, I evaluate the effects of the alleged subsidization and dumping<sup>80</sup> on domestic prices, domestic sales, and domestic revenues. To evaluate the effects of the alleged subsidization and dumping on domestic prices, I compare domestic prices that existed when the imports were allegedly subsidized and dumped with what domestic prices would have been if the imports had been priced fairly. Similarly, to evaluate the effects of alleged subsidization and dumping on the quantity of domestic sales,<sup>81</sup> I compare the level of domestic sales that existed when imports were allegedly subsidized and dumped with what domestic sales would have been if the imports had been priced fairly. The combined price and quantity effects translate into an overall domestic revenue impact. Understanding the impact on the domestic industry's prices, sales, and overall revenues is critical to determining the state of the industry, because the effects on the statutory impact factors<sup>82</sup> (e.g., employment, wages, etc.) are derived from the impact on the domestic industry's prices, sales, and revenues.

I then determine whether the price, sales, and revenue effects of the alleged subsidization and dumping, either separately or together, demonstrate that there is a reasonable indication that the domestic industry would have been materially better off if the imports had been priced fairly. If so, there is a reasonable indication that the domestic industry is materially injured by reason of the allegedly subsidized and dumped imports.

For the reasons discussed below, I determine that there is no reasonable indication that the domestic industry producing cookies is materially injured by reason of allegedly subsidized and LTFV imports of butter cookies in tins from Denmark.

---

<sup>79</sup> Both the Court of International Trade and the United States Court of Appeals for the Federal Circuit have held that the "statutory language fits very well" with my mode of analysis, expressly holding that my mode of analysis comports with the statutory requirements for reaching a determination of material injury by reason of the subject imports. United States Steel Group v. United States, 96 F.3d 1352, at 1361 (Fed.Cir. 1996), *aff'd* 873 F.Supp. 673, 694-695 (Ct. Int'l Trade 1994).

<sup>80</sup> As part of its consideration of the impact of imports, the statute as amended by the URAA now specifies that the Commission is to consider in an antidumping proceeding, "the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V).

<sup>81</sup> In examining the quantity sold, I take into account sales from both existing inventory and new production.

<sup>82</sup> 19 U.S.C. § 1677(7)(C)(iii).

### **C. Conditions of Competition**

To understand how an industry is affected by unfair imports, we must examine the conditions of competition in the domestic market. The conditions of competition constitute the commercial environment in which the domestic industry competes with unfair imports, and thus form the foundation for a realistic assessment of the effects of the subsidization and dumping. This environment includes demand conditions, substitutability among and between products from different sources, and supply conditions in the market.

In these investigations, I have given petitioner the benefit of the doubt concerning the conditions of competition in the domestic market, even though an analysis of the facts could support a contrary conclusion. Therefore, I do not discuss in these Views the specific conditions of competition in the domestic cookie market.<sup>83</sup>

### **D. No Reasonable Indication of Material Injury by Reason of Allegedly Subsidized and LTFV Imports of Butter Cookies in Tins from Denmark<sup>84</sup>**

#### **1. Volume of Subject Imports**

The volume of subject imports was \*\*\* pounds in 1995, \*\*\* pounds in 1996, and \*\*\* pounds in 1997.<sup>85</sup> The value of subject imports was \*\*\* in 1995, \*\*\* in 1996, and \*\*\* in 1997.<sup>86</sup>

The market share of subject imports derives from the apparent consumption of all cookies. Given the short time frame provided for preliminary investigations, it was not feasible to obtain consumption data from the nearly 200 domestic producers of cookies<sup>87</sup> or all importers of cookies. However, Commission staff estimated that apparent consumption of all cookies exceeded \$5 billion in 1996.<sup>88</sup> While this estimate of apparent consumption is not precise, it does demonstrate the order of magnitude of total cookie consumption relative to the value of subject imports. This record evidence indicates that the market share of subject imports by value was less than one percent in 1997. It is clear that the larger the volume of subject imports, the larger effect they will have on the domestic industry. Whether the volume is significant cannot be determined in a vacuum, but must be evaluated in the context of its price and volume effects. Based on the extremely small market share of subject imports, I find that the volume of the subject imports is not significant in light of its price and volume effects.

---

<sup>83</sup> For an example of a complete discussion of my application of the conditions of competition factors, see Certain Preserved Mushrooms, USITC Pub. 3086 at 21 (Views of Commissioner Carol T. Crawford.)

<sup>84</sup> Subject imports accounted for virtually all butter cookies in tins imported into the United States in 1997. CR at Table IV-1, PR at Table IV-1. Consequently, negligibility is not an issue.

<sup>85</sup> CR at Table IV-1; PR at Table IV-1.

<sup>86</sup> Id.

<sup>87</sup> The Commission received completed questionnaire responses from only five of approximately 191 domestic cookie producers, and two of the three largest cooking producers did not complete the questionnaire. CR at III-1 & n. 1, PR at III-1 & n. 1.

<sup>88</sup> Memorandum INV-V-017 (March 19, 1998). While apparent consumption was estimated to increase by 3.9 percent from 1994 to 1996, I have assumed no increase from 1996 to 1997, and have used the 1996 estimate in my analysis.

## **2. Effect of Subject Imports on Domestic Prices**

I find that subject imports are not having significant effects on domestic prices for cookies. To determine the effect of subject imports on domestic prices, I examine whether the domestic industry could have increased its prices had the subject imports not been subsidized and dumped.

In most cases, if the subject imports had not been traded unfairly, their prices in the U.S. market would have increased. For purposes of these preliminary investigations, I have used the dumping margins, which range from 42 percent to 83 percent, alleged by petitioner.<sup>89</sup> Based on the alleged dumping margins alone, prices for the subject imports likely would have risen significantly if they had been priced fairly, and they would have become more expensive relative to the domestic product and other alternative sources for the product (*e.g.*, nonsubject imports). In such a case, if the products are substitutable, demand would have shifted away from subject imports and towards the relatively less-expensive products. There are no precise data on the record concerning the volume of nonsubject imports in the domestic market. Therefore, for purposes of these preliminary investigations, I have given petitioner the benefit of the doubt and assumed that the domestic industry is the primary source available to meet any shift in demand away from subject imports.

I have given petitioner the benefit of the doubt and assumed that the subject imports would have been priced out of the market had they not been subsidized and dumped. Also, I have assumed that the domestic product and subject imports are good substitutes for each other, and that the entire demand for subject imports would have shifted to the domestic product, had subject imports been priced fairly. However, these cookies represent such a small share, less than one percent, of the entire cookie market that the increase in demand for the domestic product would not have been significant or affected prices. In addition, while the members of the domestic cookie industry that completed the Commission's questionnaire account for only a small portion of the overall industry, they alone had sufficient capacity available to satisfy the demand supplied by the subject imports.<sup>90</sup> The available capacity would have enforced price discipline in the market. Therefore, given the extremely small market share of subject imports and the available capacity in the domestic industry, I find that domestic prices would not have increased had the subject imports been fairly traded. Consequently, I find that subject imports are not having significant effects on domestic prices for cookies.

---

<sup>89</sup> Petition at 17. No specific subsidy margins were alleged.

<sup>90</sup> CR at Table III-1, PR at Table III-1.

### **3. Impact of Subject Imports on the Domestic Industry**

To assess the impact of subject imports on the domestic industry, I consider output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, research and development and other relevant factors.<sup>91</sup> These factors together either encompass or reflect the volume and price effects of the allegedly subsidized and dumped imports, and so I gauge the impact of the dumping and subsidization through those effects.

As noted above, I have given petitioner the benefit of the doubt and assumed that the entire demand for subject imports would have shifted to the domestic product, had the subject imports been priced fairly. However, as I have noted, the market share of subject imports, less than one percent, is so small that the increase in demand for the domestic product would not have been significant. Therefore, any increase in the domestic industry's output and sales would not have been significant. Consequently, subject imports are not having a significant impact on the domestic industry.

### **4. Conclusion**

Based on my findings that the subject imports are not having significant effects on domestic prices and are not having a significant impact on the domestic industry, I find that the domestic industry would not have been materially better off if the subject imports had been priced fairly. Consequently, I determine that there is no reasonable indication that the domestic cookie industry is materially injured by reason of allegedly subsidized and LTFV imports of butter cookies in tins from Denmark.

## **IV. NO REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF ALLEGEDLY SUBSIDIZED AND LTFV IMPORTS OF BUTTER COOKIES IN TINS FROM DENMARK**

We determine that there is no reasonable indication that an industry in the United States is threatened with material injury by reason of the subject imports. Section 771(7)(F) of the Act directs the Commission to determine whether the U.S. industry is threatened with material injury by reason of the subject imports by determining whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted."<sup>92</sup> The Commission considers the threat factors "as a whole" and may not make

---

<sup>91</sup> 19 U.S.C. § 1677(7)(C)(iii).

<sup>92</sup> 19 U.S.C. §§ 1671b(a), 1673b(a) and 1677(7)(F)(ii).

such determination “on the basis of mere conjecture or supposition.”<sup>93</sup> In making our determination, we have considered all of the statutory factors that are relevant to these investigations.<sup>94</sup>

Chairman Miller finds that there is no reasonable indication that the domestic industry producing cookies in tins is threatened with material injury by reason of the subject imports. Commissioner Crawford finds that there is no reasonable indication that the domestic industry producing cookies is threatened with material injury by reason of the subject imports.

Commerce initiated an investigation of the following two alleged subsidy programs: (1) *European Union Program*: Export Restitution Payments on Butter, Sugar and Wheat Flour; and (2) *Government of Denmark Programs*: Export Credit and Insurance Program, Export Training Program, and Assistance for Export Groups. Commerce provided no further information as to the nature of these alleged subsidies in its initiation notice. Respondents admit the existence of the EU subsidy program, but note that these subsidies have been reduced during the last two years. Respondents deny that they receive export subsidies from the Government of Denmark.<sup>95</sup> We have taken petitioner’s subsidies allegations into account, but note respondents’ statements that the alleged subsidies have been reduced during the past two years and gradually are being phased down pursuant to the WTO Agriculture Agreement.<sup>96</sup> Given the likelihood that the levels of the alleged subsidies will decline, not increase, we find that imports of the subject merchandise are not likely to increase substantially because of the alleged subsidies.

We also note that petitioner’s concerns about the alleged subsidies are focused largely on the alleged subsidization of butter used in butter cookies.<sup>97</sup> Chairman Miller has defined the domestic industry as all U.S. producers of cookies in tins, and Commissioner Crawford has defined the domestic industry as all U.S. cookie producers. Since we have each defined the domestic industry to include production of cookies other than butter cookies, any relationship between the alleged subsidies and any threat of material injury by reason of the subject imports is further attenuated.

We find that the information concerning production capacity and capacity utilization in Denmark does not show that a substantial increase in subject imports into the United States is likely. Capacity in Denmark to produce butter cookies in tins has declined from 141.8 million pounds in 1995 and 1996 to 132.3 million pounds in 1997, and is expected to remain at that level.<sup>98</sup> Capacity utilization has been fairly steady

---

<sup>93</sup> 19 U.S.C. § 1677(7)(F)(ii). An affirmative threat determination must be based upon “positive evidence tending to show an intention to increase the levels of importation.” *Metallwerken Nederland B.V. v. United States*, 744 F. Supp. 281, 287 (Ct. Int’l Trade 1990), citing *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1280 (Ct. Int’l Trade 1984). See also *Calabrian Corp. v. United States*, 794 F. Supp. 377, 387 & 388 (Ct. Int’l Trade 1992), citing H.R. Rep. No. 1156, 98th Cong., 2d Sess. 174 (1984).

<sup>94</sup> 19 U.S.C. § 1677(7)(F)(I). Factor VII is inapplicable because these investigations do not involve a raw agricultural product, as defined in 19 U.S.C. § 1677(4)(E)(iv).

<sup>95</sup> Respondents’ Postconference Brief at 17 and Exhibit I, Tr. at 78 and 89.

<sup>96</sup> Tr. at 78-79 and 89-90.

<sup>97</sup> See Tr. at 86.

<sup>98</sup> CR at Table VII-1, PR at Table VII-1.



since 1995, and is expected to remain at this level.<sup>99</sup> Although industry-wide annual Danish capacity utilization has ranged from 62 to 66 percent, the largest Danish exporter of subject imports, Kelsen, ran its butter cookie lines at 100 percent of capacity in 1997.<sup>100</sup> Exports to other countries in the European Union, as well as to Asian countries such as Hong Kong and China, have declined during the period of investigation. However, these countries remain strong markets for Danish butter cookies in tins.<sup>101</sup> For these reasons we find that unused capacity in Denmark does not indicate a likelihood of substantially increased imports of the subject merchandise.

Although the volume of subject imports increased overall during the period of investigation,<sup>102</sup> Chairman Miller does not find that there has been a significant rate of increase of the volume or market penetration of subject imports indicating the likelihood of substantially increased imports. In her discussion of no reasonable indication of material injury by reason of subject imports, she found that the subject imports' share of the U.S. apparent consumption of cookies in tins declined, by both volume and value, from 1995 to 1997.<sup>103</sup> This decline first occurred in 1996, when apparent domestic consumption was at its lowest levels for the three-year period.<sup>104</sup> Although apparent consumption then rose 32.9 percent by volume and 20.6 percent by value, to its period high in 1997, the subject imports' market share did not increase proportionately to the increased apparent consumption. Rather, market share increased only modestly from 1996 to 1997, that is, \*\*\* percent by volume and \*\*\* percent by value. Even with that increase, import market share was lower in 1997 than it was in 1995.<sup>105</sup> This irregular movement of import market share within a few percentage points is not indicative of threat. As such, Chairman Miller does not find evidence of a significant, if any, rate of increase in market penetration by the subject imports.

In her determination of no reasonable indication of material injury by reason of the subject imports, Commissioner Crawford found that the market share of subject imports, less than one percent, is extremely small. Given this small base, an increase in the volume of the subject imports could result in a large rate of increase. However, since the market share is so small, it is not likely that any increase in the imports themselves would be substantial. Consequently, Commissioner Crawford finds that the rate of increase of the volume or market penetration of subject imports does not indicate the likelihood of substantially increased subject imports.

---

<sup>99</sup> *Id.*

<sup>100</sup> Respondents' Postconference Brief at 21.

<sup>101</sup> CR at Table VII-1, PR at Table VII-1, Respondents' Postconference Brief at 20-21.

<sup>102</sup> CR at Table IV-1, PR at Table IV-1.

<sup>103</sup> CR at Table C-5, PR at Table C-5.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

In our respective discussions of no reasonable indication of material injury by reason of the subject imports, we found that subject imports are not having significant effects on domestic prices. We find nothing in the record to indicate that subject imports are likely to have significant price effects in the immediate future.<sup>106</sup>

The evidence on the record does not indicate that inventories of the subject merchandise, either in the United States or in Denmark, represent a threat of material injury to a domestic industry. Although the volume of subject import inventories in the United States increased from 1995 to 1997, the inventories do not represent a high percentage of the quantity of subject imports.<sup>107</sup> In Denmark, the ratio of inventories of butter cookies in tins to both production and shipments is low, peaking for both at \*\*\* percent in 1997.<sup>108 109</sup>

Despite petitioner's argument that it is easy for Danish producers to shift production between butter cookies and non-butter cookies,<sup>110</sup> the Danish producers currently devote more than \*\*\* percent of their cookie production to butter cookies.<sup>111</sup> The evidence suggests that the ability of the Danish producers to increase significantly their production of butter cookies and thereby significantly increase their exports to the United States is relatively limited. In addition, given the relatively constant volumes exported to the United States during the period of investigation, the record does not suggest that the Danish producers are likely in the imminent future to shift production from nonbutter cookies to butter cookies. Thus, the evidence does not indicate that the ability of the foreign producers to turn some of their production to butter cookies poses a threat of material injury to either the domestic industry producing cookies in tins or to the domestic industry producing cookies, particularly in light of the other evidence discussed above.

Petitioner and Little Dutch Boy suggested that the subject imports may negatively affect \*\*\*.<sup>112</sup> \*\*\* bases this assertion on the current levels of pricing in the U.S. market, while \*\*\*.<sup>113</sup> Because she has found that there is no reasonable indication that the domestic industry is presently adversely affected by the subject imports, Chairman Miller discounts the argument that pricing will in the imminent future negatively impact development and production efforts of the domestic producers of cookies in tins.<sup>114</sup>

---

<sup>106</sup> See *Timken Co. v. United States*, 20 CIT \_\_, Slip Op. 96-8 at 9 (Jan. 3, 1996) (in assessing immediate future harm resulting from domestic price suppression or depression by subject imports, the Commission is permitted to rely on its findings on material injury that subject imports had no "present effect on prices.")

<sup>107</sup> CR at Table VII-2, PR at Table VII-2. At the end of 1997, the ratio of U.S. importers' inventories of subject imports to imports was 7.7. percent; their ratio to U.S. shipments of imports was 7.9 percent.

<sup>108</sup> CR at Table VII-1, PR at Table VII-1.

<sup>109</sup> Commissioner Crawford finds that these inventories of subject imports in Denmark and the United States account for a minuscule percentage of U.S. apparent domestic consumption of cookies, and thus do not represent a threat of material injury to the domestic industry. See Memorandum INV-V-017.

<sup>110</sup> Petitioner's Postconference Brief at 49-50.

<sup>111</sup> Foreign Producers' Questionnaires at page 2.

<sup>112</sup> CR at E-4, PR at E-3.

<sup>113</sup> *Id.*

<sup>114</sup> The statute provides that [t]he presence or absence of any factor . . . shall not necessarily give decisive guidance with respect to the determination." 19 U.S.C. § 1677(F)(ii). Particularly where evidence about a statutory factor is speculative in nature, the Commission may discount it or give it limited weight, See, e.g., *Bic Corp. V. United States*, (continued...)

Commissioner Crawford finds that butter cookies in tins represent a minuscule percentage of all U.S. cookie production.<sup>115</sup> Therefore, any negative effects on petitioner's and Little Dutch Boy's development and production efforts represent only a minuscule effect on the overall cookie industry. Consequently, she finds that any actual or potential negative effects of the subject imports on existing development and production efforts do not constitute a threat of material injury to the domestic cookie industry.

Finally, we find no indication of any "other demonstrable adverse trends" that indicate that there is likely to be material injury by reason of the subject imports.

Evaluating all the statutory factors, we find that further dumped or subsidized imports of butter cookies in tins from Denmark are not imminent and that material injury by reason of allegedly subsidized and LTFV imports would not occur unless a countervailing duty or antidumping order is issued. Therefore, we determine that there is no reasonable indication that a domestic industry is threatened with material injury by reason of allegedly subsidized and LTFV imports of butter cookies in tins from Denmark.

## **V. CONCLUSION**

For the foregoing reasons, we determine there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of allegedly subsidized and LTFV imports of butter cookies in tins from Denmark.

---

<sup>114</sup> (...continued)  
964 F.Supp. 391, 406-407 (Ct. Int'l Trade 1997), *aff'd*, No. 97-1443 (Fed. Cir. March 11, 1998).

<sup>115</sup> Compare CR and PR at Table C-1 with Memorandum INV-V-017.



## UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigations Nos. 701-TA-374 and 731-TA-780 (Preliminary)

### BUTTER COOKIES IN TINS FROM DENMARK

---

#### DISSENTING VIEWS OF VICE CHAIRMAN LYNN M. BRAGG

Based on the record in Investigations Nos. 701-TA-374 and 731-TA-780 (Preliminary), *Butter Cookies in Tins from Denmark*, I find that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of butter cookies in tins from Denmark that allegedly are subsidized and sold in the United States at less than fair value (“LTFV”).

#### I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

The legal standard for preliminary determinations requires the Commission to determine, based upon the information available at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured, or threatened with material injury, by reason of the allegedly subsidized or LTFV imports.<sup>1</sup> In applying this standard, the Commission weighs the evidence before it and determines whether “(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.”<sup>2</sup>

#### II. DOMESTIC LIKE PRODUCT AND INDUSTRY

##### A. In General

To determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of the subject imports, the Commission first defines the “domestic like product” and the “industry.”<sup>3</sup> Section 771(4)(A) of the Tariff Act of 1930 as amended (“the Act”) defines the relevant industry as the “producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the

---

<sup>1</sup> 19 U.S.C. §§ 1671b(a) and 1673b(a); *see also American Lamb Co. v. United States*, 785 F.2d 994 (Fed. Cir. 1986); *Calabrian Corp. v. United States*, 794 F. Supp. 377, 381 (Ct. Int’l Trade 1992).

<sup>2</sup> *American Lamb*, 785 F.2d at 1001; *see also Texas Crushed Stone Co. v. United States*, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

<sup>3</sup> 19 U.S.C. § 1677(4)(A).

total domestic production of the product.”<sup>4</sup> In turn, the Act defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation.”<sup>5</sup>

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of “like” or “most similar in characteristics and uses” on a case-by-case basis.<sup>6</sup> No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.<sup>7</sup> The Commission looks for clear dividing lines among possible like products, and disregards minor variations.<sup>8</sup> Although the Commission must accept the determination of Commerce as to the scope of the imported merchandise allegedly subsidized or sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.<sup>9</sup>

## **B. Product Description**

In its notice of initiation, Commerce defined the imported merchandise within the scope of these investigations as:

*Flat baked sweet biscuits made from a mixture of ingredients which may include, but are not limited to butter, flour, eggs, and sugar. As defined by the U. S. Food and Drug Administration Compliance Policy Guide 7102.06, Chapter 5, Sec. 505.200, butter cookies are distinguishable from all other cookies in that “all of the shortening ingredient is butter.” The butter cookies covered by these investigations are only those in hard containers (“tins”), which include, but are not limited to, those that are made of metal, and are round, printed with colorful decorative logos and/or pictures, and which have closeable lids.*<sup>10</sup>

---

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid* at § 1677(10).

<sup>6</sup> See, e.g., Nippon Steel Corp. v. United States, 19 CIT \_\_\_, Slip Op. 95-57 at 11 (Apr. 3, 1995). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. See Nippon Steel at 11, n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int’l Trade 1996).

<sup>7</sup> See, e.g., S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979).

<sup>8</sup> Torrington Co. v. United States, 747 F. Supp. 744, 748-49 (Ct. Int’l Trade 1990), *aff’d*, 938 F.2d 1278 (Fed. Cir. 1991).

<sup>9</sup> Hosiden Corp. v. Advanced Display Manufacturers, 85 F.3d 1561 (Fed. Cir. 1996) (Commission may find a single like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-752 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

<sup>10</sup> *Initiation of Antidumping and Countervailing Duty Investigations: Butter Cookies in Tins from Denmark*, U.S. Department of Commerce, 63 Fed. Reg. 10822/23 (March 5, 1998).

The imported products subject to these investigations are butter cookies in tins: small, baked confectionery items produced by mixing portions of butter, sugar, flour, eggs, and other flavoring, and then baking. They are distinguished from other cookies on the basis of their shortening ingredient, which, as defined by the U.S. FDA (see above), must only be butter. While butter cookies in general may be packaged in a variety of fashions (*e.g.*, tins, paper bags, plastic tubs, cardboard boxes, trays, or plastic foil), the butter cookies subject to these investigations are carefully packed in small paper cups, tastefully arranged inside elaborate decorative tins, covered with a padded paper insert, and sealed.<sup>11</sup>

### **C. Domestic Like Product and Domestic Industry Issues in These Investigations**

At issue in these investigations is whether to include within the domestic like product certain categories of domestically produced merchandise in addition to that included by Commerce in the scope of its investigations. While petitioner contends that the like product should be coextensive with the scope, respondents argue that the like product should be broadened to include all cookies.

In general, when making a like product determination, I first attempt to identify a domestic product that is “like” the merchandise subject to the scope of the investigation as identified by Commerce, and only in the absence of a product that is “like” the subject merchandise do I attempt to identify a product that is “most similar in characteristics and uses.” Notwithstanding respondents’ reliance on the Commission’s determination in a 1980 investigation involving butter cookies from Denmark,<sup>12</sup> the Commission is not bound by prior determinations concerning the same imported products.<sup>13</sup>

For the reasons discussed below, based on the record in the preliminary phase of these investigations, I find a single domestic like product, butter cookies in tins, consisting of all products corresponding to the scope description. Likewise, I find a domestic industry consisting of the two domestic producers of butter cookies in tins: Maurice Lenell and Little Dutch Boy.

#### **1. Physical Characteristics and Uses**

The most prominent physical characteristics of butter cookies in tins, not surprisingly, are the composition of the cookies themselves and the unusual containers which simultaneously serve to protect, preserve, and market the cookies. Neither characteristic is unique in and of itself; however, in combination, they serve to differentiate butter cookies in tins from other cookies.

---

<sup>11</sup> Confidential Staff Report (“CR”) at I-7 and I-8, Public Staff report (“PR”) at I-7.

<sup>12</sup> Butter Cookies from Denmark, Inv. No. 701-TA-51 (Final), USITC Pub. 1077 (June 1980).

<sup>13</sup> Nippon Steel, Slip Op. 95-57 at 11; Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1088 (Ct. Int’l Trade 1988).

Under guidelines established by the U.S. FDA, a “butter cookie” must have butter as its sole shortening ingredient, while all other cookies contain either no shortening or some amount of non-butter shortening.<sup>14</sup> The domestic producers typically prepare an assortment of shapes and flavorings of butter cookies which they pack in individual paper holders and sell exclusively in their standard blue and white 16-18 ounce decorated tins.<sup>15</sup> These tins preserve the cookies and extend their shelf life beyond that of cookies sold in other forms of packaging.<sup>16</sup> Other cookies are typically prepared for sale in uniform flavor and size lots and contained within paper or other less-substantial packaging. Even non-butter cookies contained in tins are usually loose packed.<sup>17</sup>

The ultimate “use” for virtually any cookie is as a snack or dessert. However, cookies in tins (including butter cookies) are often purchased as gift items or for decorative purposes. Moreover, butter cookies in tins are primarily seasonal items, manufactured and sold predominantly for the Christmas season, whereas other cookies are sold throughout the year.<sup>18</sup> Although respondents contend that butter cookies in tins are becoming less of a seasonal item,<sup>19</sup> all parties agree that the peak season for butter cookies in tins is the Christmas season.<sup>20</sup>

## **2. Interchangeability**

All types of cookies are interchangeable in the sense that they are baked for the express purpose of being devoured as snack or dessert items. The same could be said of many baked goods. However, cookies in tins are viewed as gift or collectible items.<sup>21</sup> And while all cookies in tins share the positive characteristics associated with the tin packaging, including the value added by the tin and longer shelf life for the cookies, butter cookies and non-butter cookies are packaged in different tins, rather than co-mingled.<sup>22</sup> Petitioner

---

<sup>14</sup> Respondents allege that petitioner’s “butter cookies” are actually misnamed, because laboratory tests commissioned by respondents presumably show that petitioner’s cookies contain other types of shortening. Conference Transcript at 86-87 (testimony of Mr. Norgaard); Respondents’ Postconference Brief at 7-10. In response, petitioner affirmed that all of its butter cookies are made with 100 percent butter as the shortening, and provided information obtained from independent laboratories indicating that the types of tests conducted by respondents are inherently inaccurate. Conference Transcript at 138-139 (testimony of Mr. W. Cohen); Petitioner’s Postconference Brief at 3, n.5 and Exhibits 2 and 3. Given the clear definition of butter cookies by the U.S. FDA, I do not find cause to dispute the petitioner’s characterization of its product.

<sup>15</sup> CR at I-11, PR at I-10. Maurice Lenell’s 18-ounce tin is the same size as its 16-ounce tin, though it is packed with an additional cup of cookies and is labeled accordingly. CR at I-8, n. 27, PR at I-7, n. 27. Little Dutch Boy sells butter cookies only in 16-ounce tins. CR at V-9, PR at V-6.

<sup>16</sup> CR at I-12, PR at I-10; Conference Transcript at 61 (testimony of Mr. W. Cohen).

<sup>17</sup> CR at I-12, n. 49, PR at I-10, n. 49.

<sup>18</sup> CR at I-13, PR at I-11.

<sup>19</sup> Conference Transcript at 105 (testimony of Mr. Norgaard).

<sup>20</sup> Petitioner’s Postconference Brief at 13-15; Conference Transcript at 114 (testimony of Mr. Norgaard). *See also* the volume of shipments to retailers in the fourth quarters of 1995, 1996, and 1997 by U.S. producers and importers. Table V-1, CR at V-12, PR at V-9.

<sup>21</sup> CR at I-9 and I-11, PR at I-8 and I-10.

<sup>22</sup> Public Meeting Transcript at 7 (testimony of Mr. Eninger).



stated that it tried to sell non-butter cookies similar in appearance to butter cookies in gift packaging to compete with butter cookies in tins, but failed at that effort.<sup>23</sup>

### **3. Channels of Distribution**

The predominant channel of distribution for cookies generally (including butter cookies not in tins) is through retail grocery stores.<sup>24</sup> In contrast, cookies in tins (including both butter and non-butter cookies) are sold in a national market, to distributors, retailers and wholesalers such as drug chains, wholesale/warehouse clubs, discount drug chains and mass merchants.<sup>25</sup> Within this broad channel structure, there is evidence of further differentiation: both domestic producers and reporting U.S. importers overwhelmingly sell butter cookies in tins directly to retailers, rather than through distributors.<sup>26</sup>

### **4. Customer and Producer Perceptions**

As discussed above, cookies packed in tins are perceived as gift items. In contrast, cookies (including butter cookies) in other forms of packaging are perceived by customers and producers as common food items and generally would not be considered a suitable gift.<sup>27</sup>

Petitioner indicated that, prior to producing butter cookies in tins, it conducted significant market research, which showed a distinct product and market for butter cookies in tins. According to petitioner, butter cookies sold in the distinctive blue tins are perceived as seasonal items, generally given as gifts during the Christmas season.<sup>28</sup> While Little Dutch Boy did not comment on this factor, it too packages its butter cookies in a traditional blue tin.<sup>29</sup> Respondents suggested that their cookies are becoming less of a seasonal item, although they conceded that the large majority of sales occur in the last quarter of the calendar year.<sup>30</sup>

---

<sup>23</sup> Petitioner's Postconference Brief at 16, Conference Transcript at 23 (testimony of Mr. T. Cohen).

<sup>24</sup> CR at I-14 and III-6-III-7, PR at I-12 and III-5.

<sup>25</sup> CR at I-13, PR at I-12.

<sup>26</sup> CR at II-2, PR at II-2. *See also* Petitioner's Postconference Brief at 19.

<sup>27</sup> CR at I-13, PR at I-11.

<sup>28</sup> Petitioner's Postconference Brief at 20.

<sup>29</sup> Conference Transcript at 128 (testimony of Mr. Berry).

<sup>30</sup> Conference Transcript at 114 (testimony of Mr. Norgaard).

## **5. Common Manufacturing Facilities, Production Processes, and Production Methods**

At the baking stage, butter cookies and non-butter cookies are produced at the same facilities, on the same production lines, and using the same processes, equipment, and employees. However, packaging butter cookies requires several times more labor than baking butter cookies,<sup>31</sup> and it is at the packaging stage that distinctions between butter cookies in tins and other cookies emerge. The packaging of butter cookies in tins is often more labor intensive than the packaging of other types of cookies, even non-butter cookies packaged in tins. Butter cookies are hand packaged into paper cups and tins using specially trained labor, whereas most other cookies are mechanically inserted into their containers or otherwise require no specialized labor.<sup>32</sup>

## **6. Price**

The prices of cookies fluctuate widely depending upon a variety of factors, not the least of which is brand recognition.<sup>33</sup> However, at the retail level, the record indicates that there exist particular “price points” at which butter cookies in tins tend to be sold (*e.g.*, \$2.99 or 2 for \$5.00 price points for butter cookies in a 1-pound tin).<sup>34</sup>

## **7. Conclusion**

Applying the traditional six-factor analysis, for purposes of the preliminary phase of these investigations I find the like product to be coextensive with the scope of these investigations, based on differences in customer and producer perceptions, channels of distribution, pricing practices, and specific uses, as well as the additional, specialized labor and the particular physical characteristics attributable to the use of the tin container. I find that these factors outweigh the degree of interchangeability existing between butter cookies in tins and other cookies based on a commonality of general uses and the overlap in terms of manufacturing facilities, production processes, and production methods at the baking stage of production. Therefore, I find a domestic industry consisting of the two domestic producers of butter cookies in tins: Maurice Lenell and Little Dutch Boy.

---

<sup>31</sup> Public Meeting Transcript at 5-7 (testimony of Mr. Eninger and Mr. Fischer). Maurice Lenell reported that the cost of bakery labor accounted for \*\*\* per pound of butter cookies in tins produced in 1997, while the cost of packing labor accounted for a significantly higher amount, \*\*\* per pound. CR at VI-9, PR at VI-4.

<sup>32</sup> Even other cookies packaged in tins are, for the most part, loose packed, requiring no special labor. *See, e.g.*, CR at I-8, n. 32, PR at I-7, n. 32, describing packaging operations at Maurice Lenell. Approximately \*\*\* percent of Lenell’s “holiday bear” tins, which contain an assortment of vegetable shortening cookies, are loose packed. CR at I-11, n. 49, PR at I-10, at n. 49.

<sup>33</sup> For example, Pepperidge Farm’s average price per pound of its butter cookies in bags is \*\*\* percent higher than the average price per pound of U.S.-produced butter cookies in tins. CR at V-8, PR at V-6.

<sup>34</sup> CR at I-14, PR at I-12. There does not appear to be a corresponding price point for butter cookies in tins at the wholesale level. *Ibid.*

### **III. NO REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF ALLEGEDLY SUBSIDIZED AND LTFV IMPORTS**

In preliminary investigations, the Commission determines whether there is a reasonable indication that an industry in the United States is materially injured by reason of the imports subject to investigation.<sup>35</sup> The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.”<sup>36</sup> In making this determination, the Commission must consider the volume of imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.<sup>37</sup> Although the Commission may consider causes of injury to the industry other than the allegedly subsidized and LTFV imports,<sup>38</sup> it is not to weigh causes.<sup>39</sup>

In assessing whether there is a reasonable indication that the domestic industry is materially injured by reason of the subject imports, the Commission considers all relevant economic factors that bear on the state of the industry in the United States.<sup>40</sup> These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>41</sup>

For the reasons discussed below, I determine that there is no reasonable indication that the domestic industry producing butter cookies in tins is materially injured by reason of allegedly subsidized and LTFV imports from Denmark.

---

<sup>35</sup> 19 U.S.C. §§ 1671b(a)(1) and 1673b(a).

<sup>36</sup> 19 U.S.C. § 1677(7)(A).

<sup>37</sup> 19 U.S.C. § 1677(7)(B)(i). The Commission “may consider such other economic factors as are relevant to the determination,” but shall “identify each [such] factor . . . and explain in full its relevance to the determination.” 19 U.S.C. § 1677(7)(B).

<sup>38</sup> Alternative causes may include the following:

[T]he volume and prices of imports sold at fair value, contraction in demand or changes in patterns of consumption, trade, restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry.

S. Rep. No. 249, 96th Cong., 1st Sess. 74 (1979). Similar language is contained in the House Report. H.R. Rep. No. 317, 96th Cong., 1st Sess. 46-47 (1979).

<sup>39</sup> See, e.g., Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1101 (Ct. Int'l Trade 1988).

<sup>40</sup> 19 U.S.C. § 1677(7)(C)(iii).

<sup>41</sup> *Ibid.*

### **A. Conditions of Competition**

I find several conditions of competition relevant to my analysis in these investigations. First, I note that imports of Danish butter cookies in tins have had a significant presence in the U.S. market for a number of years, while Maurice Lenell and Little Dutch Boy are relatively new to high-volume, commercial production of butter cookies in tins.<sup>42</sup> I also note that while domestically produced and Danish butter cookies in tins are similar in appearance and quality, competition for customers (primarily mass merchandise chain stores) is affected by the absence of U.S.-produced butter cookies in tins in sizes greater than 18 ounces.<sup>43</sup>

Furthermore, butter cookies in tins are a seasonal product, with a large majority of sales occurring in the fourth quarter of each calendar year, and are often bought as Christmas gifts. There is some evidence, however, that this seasonality may be diminishing with the growth of mass merchandise chain stores, where butter cookies in tins are offered for sale year-round.<sup>44</sup>

Finally, the butter content in butter cookies is significant and the cost relative to other forms of shortening and to other ingredients in butter cookies is high and subject to noticeable fluctuations.<sup>45</sup> The parties agree that fluctuations in the price of butter can have a major impact on the cost structure for producing butter cookies in tins.<sup>46</sup>

### **B. Volume of Subject Imports**

On balance, I find that the volume and the increase in the volume of imports of butter cookies in tins from Denmark was significant between 1995 and 1997. While U.S. consumption of butter cookies in tins increased over the period examined, the growth in U.S. imports of the subject merchandise outstripped the rise in consumption.<sup>47</sup> The quantity of subject imports fell from \*\*\* pounds in 1995 to \*\*\* pounds in 1996, then rose to \*\*\* pounds in 1997, a net increase of \*\*\* percent over the period examined. The value of subject imports fell from \*\*\* in 1995 to \*\*\* in 1996, then rose to \*\*\* in 1997, a net increase of \*\*\* percent over the period examined.<sup>48</sup>

The market share of U.S. shipments of subject imports, by quantity, fell from \*\*\* percent in 1995 to \*\*\* percent in 1996, then recovered to \*\*\* percent in 1997, for a net increase of \*\*\* percentage points. The

---

<sup>42</sup> Conference Transcript at 113 (testimony of Mr. Norgaard); CR at III-3-III-6, PR at III-2-III-4.

<sup>43</sup> CR at II-7-II-9, PR at II-5-II-6. Only \*\*\* percent of the sales of the largest importer of butter cookies in tins from Denmark, Kelsen, were in 16 ounce tins. CR at II-7, PR at II-5.

<sup>44</sup> Conference Transcript at 105 (testimony of Mr. Norgaard).

<sup>45</sup> The butter content of butter cookies is 26-32 percent. The cost per pound of butter is reportedly several times the cost of vegetable shortening and sugar, and can range from \$0.70 per pound to \$1.40 per pound. Conference Transcript at 63 and 66 (testimony of Mr. W. Cohen).

<sup>46</sup> Conference Transcript at 66 and 67 (testimony of Mr. W. Cohen); Petition at 28; Respondents' Postconference Brief at 22.

<sup>47</sup> Compare, Tables IV-1, CR at IV-3, PR at IV-2 with Table IV-3, CR at IV-6, and PR at IV-5.

<sup>48</sup> Table IV-1, CR at IV-3, PR at IV-2. According to Commission questionnaire responses, imports of butter cookies in tins from Denmark accounted for no less than 99 percent of total imports in any given year during the period examined. Consequently, I find that the subject imports should not be deemed negligible.

market share of U.S. shipments of subject imports, by value, fell from \*\*\* percent in 1995 to \*\*\* percent in 1996, then recovered to \*\*\* percent in 1997, for a net increase of \*\*\* percentage points. In contrast, the domestic industry's market share by quantity increased from \*\*\* percent in 1995 to \*\*\* percent in 1996, then decreased to \*\*\* percent in 1997, a net decline of \*\*\* percentage points during 1995-97. Market shares by value followed a similar, though less pronounced, trend, resulting in a net decrease of \*\*\* percentage points.<sup>49</sup>

Based on the rising volume and market share of the subject imports over the period examined as a whole, as well as their displacement of domestic production in 1997,<sup>50</sup> I find both the volume of subject imports and the increase in that volume over the period examined to be significant.

### **C. Price Effects of Subject Imports**

On balance, I find that there has not been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and that the subject imports have not depressed prices to a significant degree or prevented price increases, which otherwise would have occurred, to a significant degree. At the outset, I note two facts about the companies that comprise the domestic industry producing butter cookies in tins. First, the petitioner, Maurice Lenell, entered the market by offering a greater volume of tinned product at a lower price than its Danish competitors, then in 1997, the company both reduced the weight of its tinned product and increased its price to purchasers.<sup>51</sup> Second, Little Dutch Boy sold butter cookies in tins to \*\*\*, at a \*\*\* throughout the period examined.<sup>52</sup> I find that these company-specific facts help to place the industry-wide data in perspective.

The Commission collected quarterly pricing data on butter cookies in 16- and 18-ounce tins sold to retail stores. The Danish product oversold the domestic product throughout the 9 quarters of 1995, 1996, and first quarter 1997 by an average of 32.6 percent. During the last 3 quarters of 1997, the imported product undersold the domestic product by an average of 4.4 percent.<sup>53</sup>

The price trend for the Danish product was generally stable, though drifting upward, through the first quarter of 1997, then falling from \*\*\* per pound to \*\*\* per pound in the second quarter and \*\*\* per pound in the third and fourth quarters. The price trend for the domestic product drifted upward through the first quarter of 1997, rising from \*\*\* per pound to \*\*\* per pound (but reaching \*\*\* per pound in the fourth quarter of 1996). In the second quarter of 1997, small volumes of domestic product reached \*\*\* per pound,<sup>54</sup> what

---

<sup>49</sup> Tables IV-3 and IV-4, CR at IV-6 and IV-8, PR at IV-5 and IV-7.

<sup>50</sup> Nonsubject imports of butter cookies in tins declined throughout the period examined, both absolutely and as a share of apparent consumption. *Ibid.* Accordingly, subject imports displaced both the domestic and the nonsubject imported product from the U.S. market.

<sup>51</sup> Conference Transcript at 15-16 (testimony of Mr. Levine).

<sup>52</sup> Table VI-2, CR at VI-4-VI-6, PR at VI-2.

<sup>53</sup> Table V-1, CR at V-12, PR at V-9.

<sup>54</sup> As noted earlier, in 1997 Maurice Lenell both increased the unit price per tin and reduced the volume of cookies per tin from 18 to 16 ounces. This action is reflected in the abrupt upward movement in price by the domestic product in 1997 (measured in price per pound).

had been a comparable level with the Danish product, before falling to \*\*\* per pound in the third and fourth quarters.<sup>55</sup>

Given that the price of U.S. product increased irregularly through the second quarter of 1997, before declining to a level still well above 1995 prices, I find no evidence of price depression. Likewise, a finding of price suppression would be difficult to reconcile with petitioner's expressed strategy to undersell its Danish competition, at least until 1997. In 1996, when the cost to U.S. producers for butter soared,<sup>56</sup> Danish prices remained stable at \*\*\* per pound, always at least \*\*\* higher than domestic prices.<sup>57</sup> Even in 1997, when Danish prices dipped, they appear to have fallen only to meet U.S. prices. In light of the evidence of limited underselling, both in terms of frequency and magnitude, and increases in prices for the domestic like product (and, for most of the period examined, the subject imports as well), I find that imports of butter cookies in tins from Denmark have not depressed prices to a significant degree or prevented price increases, which otherwise would have occurred, to a significant degree.

#### **D. Impact of Subject Imports**

After evaluating (within the context of the business cycle and conditions of competition that are distinctive to the affected industry) all relevant economic factors which have a bearing on the state of the industry in the United States, I do not find that the subject imports are having a significant adverse impact on the domestic industry.<sup>58</sup>

U.S. production of butter cookies in tins rose from \*\*\* pounds in 1995 to \*\*\* pounds in 1996, then fell to \*\*\* pounds in 1997, a net decrease of \*\*\* percent during the period examined. Capacity utilization

---

<sup>55</sup> Table V-1, CR at V-12, PR at V-9. I note that the Petitioner reported detailed lost sales and lost revenue allegations for the period 1995-97, while Little Dutch Boy was unable to provide any details to substantiate its allegations during the period examined. Despite staff efforts, none of the allegations could be verified, due to the inability or the unwillingness of purchasers to provide the necessary information. CR at V-13-V-15, PR at V-10-V-11. Were there to be a final phase of these investigations, I would surely have requested an in-depth exploration of the allegations by means of detailed purchaser questionnaires, backed with the force of subpoenas.

<sup>56</sup> Conference Transcript at 64 (testimony of Mr. T. Cohen).

<sup>57</sup> Table V-1, CR at V-12, PR at V-9.

<sup>58</sup> As part of its consideration of the impact of imports, the statute as amended by the Uruguay Round Agreements Act (URAA) specifies that the Commission is to consider "the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V). The SAA indicates that the amendment "does not alter the requirement in current law that none of the factors which the Commission considers is necessarily dispositive in the Commission's material injury analysis." SAA at 850. New section 771(35)(C), 19 U.S.C. § 1677(35)(C), defines the "margin of dumping" to be used by the Commission in a preliminary determination as the margin or margins published by Commerce in its notice of initiation. In these investigations, although petitioner alleged dumping margins ranging from 42 to 83 percent, Commerce did not identify the magnitude of estimated dumping margins. Given that Commerce has not provided estimated margins, I do not have a solid basis upon which to consider the margins. In any event, I do not ordinarily consider the subsidy or dumping margins to be of particular significance in evaluating the effects of subject imports on domestic producers. See Separate and Dissenting Views of Commissioner Lynn M. Bragg in Bicycles from China, Inv. No. 731-TA-731 (Final), USITC Pub. 2968 (June 1996).

increased \*\*\* percent to \*\*\* percent between 1995 and 1996, then fell to \*\*\* percent in 1997, a net decline of \*\*\* percentage points.<sup>59</sup>

The volume of U.S. producers' commercial shipments of butter cookies in tins increased from \*\*\* pounds in 1995 to \*\*\* pounds in 1996, then fell to \*\*\* pounds in 1997, a net decrease of \*\*\* percent. However, the value of U.S. producers' commercial shipments of butter cookies in tins increased from \*\*\* in 1995 to \*\*\* in 1996, then fell to \*\*\* in 1997, resulting in a net increase of \*\*\*. Moreover, the average unit value of these commercial shipments increased steadily during the period examined, rising from \*\*\* per pound in 1995 to \*\*\* in 1996 and \*\*\* in 1997, a net increase of \*\*\* percent.<sup>60</sup>

End-of-period inventories of butter cookies in tins held by U.S. producers rose from \*\*\* pounds in 1995 to \*\*\* pounds in 1996, then fell sharply to only \*\*\* pounds in 1997. As a ratio to production and shipments, such inventories remained stable between 1995 and 1996 at \*\*\* percent, then declined to \*\*\* percent in 1997.<sup>61</sup>

The number of production and related workers remained stable between 1995 and 1996, then declined from \*\*\* to \*\*\* in 1997. Both the hours worked by, and the wages paid to, these workers increased between 1995 and 1996, then decreased between 1996 and 1997, but reflected a net increase over the period examined (although hourly wages decreased over the period examined). Productivity fell, and unit labor costs rose, throughout the period examined.<sup>62</sup>

Capital expenditures by the one reporting domestic producer, Maurice Lenell, declined throughout the period examined, falling from \*\*\* in 1995 to \*\*\* in 1996 and \*\*\* in 1997. Research and development expenditures declined from \*\*\* in 1995 to \*\*\* in 1996 and 1997.<sup>63</sup>

Other financial indicators dipped between 1995 and 1996, as cost-related effects (notably the rising cost of butter) more than offset growth in the volume, value, and unit value of net sales. However, this situation was reversed in 1997, as higher unit sales values (despite lower overall sales levels) and lower unit SG&A costs overshadowed a slight increase in unit COGS. Gross profit fell from \*\*\* in 1995 to \*\*\* in 1996, then rose to \*\*\* in 1997. Operating losses worsened from \*\*\* in 1995 to \*\*\* in 1996, then improved noticeably to \*\*\* in 1997. Cash outflow expanded from \*\*\* in 1995 to \*\*\* in 1996, then contracted to \*\*\* in 1997.<sup>64</sup>

The domestic industry earned \*\*\* less gross profits in 1996 concurrent with gaining market share at the expense of the Danish importers, and earned \*\*\* more in gross profits in 1997 concurrent with losing

---

<sup>59</sup> Table III-1, CR at III-9, PR at III-7. I note, however, that the domestic industry's reported capacity of \*\*\* pounds is based on their overall capacity to produce cookies. I therefore place little weight on the capacity utilization data derived from these capacity figures.

<sup>60</sup> Table III-2, CR at III-11, PR at III-9.

<sup>61</sup> Table III-3, CR at III-13, PR at III-11.

<sup>62</sup> Table III-4, CR at III-13, PR at III-11.

<sup>63</sup> Table VI-4, CR at VI-11, PR at VI-5.

<sup>64</sup> Table VI-1, CR at VI-3, PR at VI-2.

market share at the expense of the Danish importers. Likewise, the domestic industry lost \*\*\* more at the operating income level while gaining market share in 1996, and lost \*\*\* less while surrendering market share in 1997. The domestic industry's cash flow worsened by \*\*\* between 1995 and 1996, but improved by \*\*\* between 1996 and 1997.<sup>65</sup> These trends do not support the conclusion that subject imports have adversely affected the domestic industry's financial condition.

Based on the foregoing, I am unable to find that the significant volume of subject imports is affecting adversely the prices charged, or revenue received, by the domestic industry. Accordingly, I find no reasonable indication that the domestic industry is materially injured by reason of the subject imports.

#### IV. REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF ALLEGEDLY SUBSIDIZED AND LTFV IMPORTS

For the purposes of determining whether there is a reasonable indication that a U.S. industry is threatened with material injury by reason of the subject merchandise, Section 771(7)(F) of the Act lists a number of factors for the Commission to consider.<sup>66</sup> While an analysis of the statutory threat factors necessarily involves projection of future events, "[s]uch a determination may not be made on the basis of mere conjecture or supposition."<sup>67</sup> In these investigations, the Commission must consider, in addition to other relevant economic factors, the following statutory factors in its threat analysis:

*(I) if an countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Appendix), and whether imports of the subject merchandise are likely to increase,*

*(II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,*

*(III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,*

*(IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices and are likely to increase demand for further imports,*

*(V) inventories of the subject merchandise,*

<sup>65</sup> Tables IV-4 and VI-1, CR at IV-8 and VI-3, PR at IV-7 and VI-2.

<sup>66</sup> 19 U.S.C. § 1677(7)(F)(ii); *see* 19 U.S.C. §§ 1671b(a), 1673b(a).

<sup>67</sup> 19 U.S.C. § 1677(7)(F)(ii); *see, e.g.*, S. Rep. No. 249 at 88-89; *see also* Metallwerken Nederland B.V. v. United States, 744 F. Supp. 281, 287 (Ct. Int'l Trade 1990).



(VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,

(VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product, and

(IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).<sup>68</sup>

Further direction is provided by the amendment to Section 771(7)(F)(ii), which adds that the Commission consider the threat factors “as a whole” in making its determination “whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur” unless an order issues.<sup>69</sup> In addition, the Commission must consider whether dumping findings or antidumping remedies in markets of foreign countries against the same class of merchandise suggest a threat of material injury to the domestic industry.<sup>70</sup>

## **A. Statutory Threat Factors**

### **1. Nature of the Subsidies**

Commerce initiated an investigation of the following alleged subsidy programs: (1) *European Union Program*: Export Restitution Payments on Butter, Sugar, and Wheat Flour; (2) *Government of Denmark Programs*: Export Credit and Insurance Program, Export Training Program, and Assistance for Export Groups. Commerce provided no further information as to the nature of these alleged subsidies in its notice of initiation.<sup>71</sup>

Petitioner alleges that the EU Export Restitution program is an export subsidy, *i.e.*, a subsidy described in Article 3 of the Subsidies Appendix.<sup>72</sup> Respondents admit the existence of the EU subsidy program, but argue that these subsidies have been reduced during the last two years. Respondents deny that they receive export subsidies from the Government of Denmark.<sup>73</sup>

### **2. Foreign Production Capacity**

---

<sup>68</sup> 19 U.S.C. § 1677(7)(F)(I). Factor VII is inapplicable because these investigations do not involve a raw agricultural product, as defined in 19 U.S.C. § 1677(4)(E)(iv).

<sup>69</sup> 19 U.S.C. § 1677(7)(F)(ii).

<sup>70</sup> 19 U.S.C. § 1677(7)(F)(iii)(I). There are no such findings relevant to these investigations.

<sup>71</sup> *Initiation of Antidumping and Countervailing Duty Investigations: Butter Cookies in Tins from Denmark*, U.S. Department of Commerce, 63 Fed. Reg. 10824 (March 5, 1998).

<sup>72</sup> Petitioner’s Postconference Brief at 49.

<sup>73</sup> Respondents’ Postconference Brief at 17.

While overall capacity declined between 1995 and 1997, there is significant existing unused capacity in Denmark, exceeding the total volume of butter cookies in tins sold in the United States in 1997. Other export markets are available to absorb additional exports, but the United States became Denmark's largest export market in 1997 and is projected to remain the largest in 1998 and 1999.<sup>74</sup>

### **3. Volume and Market Penetration of Subject Imports**

As I noted earlier in my discussion of the volume of the subject imports in the context of present material injury, I find that the volume and the increase in the volume of imports of butter cookies in tins from Denmark was significant between 1995 and 1997. The quantity of subject imports increased by \*\*\* percent over the period examined, and the quantity market share increased by \*\*\* percentage points. Over the same period, the value of subject imports increased by \*\*\* percent and the market share increased by \*\*\* percentage points.<sup>75</sup> Exports of Danish butter cookies in tins to the United States decreased from \*\*\* pounds in 1995 to \*\*\* pounds in 1996, then increased sharply to nearly \*\*\* pounds in 1997, and are projected to increase further in 1998 and 1999.<sup>76</sup>

I find that the significant rate of increase of the volume and market share of imports of the subject merchandise, together with the existence of unused foreign production capacity and the primacy of the U.S. export market to Danish producers, indicates the likelihood of substantially increased imports.

---

<sup>74</sup> Table VII-1, CR at VII-4, PR at VII-4. I note that respondents suggest that capacity utilization data may be affected by the seasonal nature of butter cookie production: it is normal, according to respondents, for production to be lower in the first half of the year, only to pick up in the second half to meet the Christmas rush. Respondents also state that their sales in Asia are mostly to Hong Kong and China, and have not been affected by the economic troubles in East Asia. Respondents' Postconference Brief at 20-21.

<sup>75</sup> Tables IV-2 and IV-4, CR at IV-4 and IV-8, PR at IV-3 and IV-7.

<sup>76</sup> Table VII-1, CR at VII-4, PR at VII-4. I note that respondents argue that over the longer term (the last ten years) Danish exports of butter cookies in tins to the United States have declined. Respondents' Postconference Brief at 10.

#### **4. Likely Price Effects of Subject Imports**

As I noted earlier in my discussion of the price effects of the subject imports in the context of present material injury, I find that there has not been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and that the subject imports have not depressed prices to a significant degree or prevented price increases, which otherwise would have occurred, to a significant degree. However, the noticeable decline in selling price as well as the underselling of Danish butter cookies in tins that did take place during the period examined occurred during the last three quarters of 1997.<sup>77</sup> Further, Little Dutch Boy \*\*\*, reportedly by reason of lower-priced butter cookies in tins from Denmark.<sup>78</sup> Based on these events, I find a reasonable indication that adverse price effects would likely occur unless orders were issued.<sup>79</sup>

#### **5. Inventories of Subject Merchandise**

End-of-period inventories of the subject merchandise held in Denmark nearly doubled between 1995 and 1997, rising from \*\*\* pounds in 1995 to \*\*\* pounds in 1996 and to \*\*\* pounds in 1997. Danish inventories are projected to decline in 1998 and 1999.<sup>80</sup> I note, however, that production is projected to exceed total shipments in both 1998 and 1999, a situation that would normally imply an *increase* in inventories. Moreover, end-of-period inventories of the subject merchandise held in the United States more than doubled between 1995 and 1997, rising from \*\*\* pounds in 1995 to \*\*\* pounds in 1996 and to over \*\*\* pounds in 1997.<sup>81</sup>

#### **6. Potential for Product Shifting**

Each of the four reporting Danish producers currently use production facilities to produce cookies other than butter cookies in tins, and therefore the potential for product shifting exists.<sup>82</sup>

---

<sup>77</sup> Table V-1, CR at V-12, PR at V-9.

<sup>78</sup> CR at III-5, PR at III-4. Little Dutch Boy accounted for \*\*\* percent of the U.S. industry's net sales of butter cookies in tins in 1997, and was the only company to report \*\*\* during the period examined. Table VI-2, CR at VI-4-VI-6, PR at VI-2. By another calculation, Little Dutch Boy accounted for \*\*\* percent of commercial U.S. shipments in 1997. Table III-2 and Figure III-4, CR at III-11 and III-12, PR at III-9 and III-10. I note that this allegation, which I find threatening to the industry as a whole if accurate, has not been independently confirmed by \*\*\*.

<sup>79</sup> I note that Kelsen predicts a price increase of at least 15 percent in 1998, due to higher butter prices, increases in other costs, and decreases in EU subsidies. Respondents' Postconference Brief at 22. However, the importer that retains \*\*\*, not Kelsen. Compare CR at VII-6, PR at VII-6 with CR at II-3, PR at II-2.

<sup>80</sup> Table VII-1, CR at VII-4, PR at VII-4.

<sup>81</sup> Table VII-2, CR at VII-7, PR at VII-6.

<sup>82</sup> CR at VII-3-VII-7, PR at VII-3-VII-6, as revised by OINV Memorandum INV-V-014.

## **7. Negative Effects on Development and Production Efforts**

Petitioner states that without protection under the antidumping and/or countervailing duty law, \*\*\* in 1998. Little Dutch Boy reports that it \*\*\*.<sup>83</sup> Based on these representations, which I find credible in light of the production and financial data reported by the domestic industry, I find a reasonable indication of potential negative effects on the development and production efforts of the relatively newly-fledged domestic industry.

## **8. Other Demonstrable Adverse Trends**

The Danish industry is almost completely dependent on export shipments; its home market sales account for only \*\*\* percent of its total shipments.<sup>84</sup> It is therefore unlikely that any significant portion of the butter cookies in tins shipped by the newest producer in Denmark will be to the home market.<sup>85</sup> Rather, such shipments will be produced in large part for export, and, as noted previously, the largest single export market for Danish butter cookies in tins is the United States.<sup>86</sup>

## **V. CONCLUSION**

For the foregoing reasons, I determine that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of butter cookies in tins from Denmark that allegedly are subsidized and sold in the United States at less than fair value.

---

<sup>83</sup> CR at E-4, PR at E-3.

<sup>84</sup> Table VII-1, CR at VII-4, PR at VII-4.

<sup>85</sup> See the testimony of Mr. Norgaard (“And interestingly enough, we are actually seeing a new competitor building a plant in Denmark today.”). Conference Transcript at 99.

<sup>86</sup> Table VII-1, CR at VII-4, PR at VII-4.

## DISSENTING VIEWS OF VICE CHAIRMAN LYNN M. BRAGG

Based on the record in Investigations Nos. 701-TA-374 and 731-TA-780 (Preliminary), *Butter Cookies in Tins from Denmark*, I find that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of butter cookies in tins from Denmark that allegedly are subsidized and sold in the United States at less than fair value (“LTFV”).

### I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

The legal standard for preliminary determinations requires the Commission to determine, based upon the information available at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured, or threatened with material injury, by reason of the allegedly subsidized or LTFV imports.<sup>1</sup> In applying this standard, the Commission weighs the evidence before it and determines whether “(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.”<sup>2</sup>

### II. DOMESTIC LIKE PRODUCT AND INDUSTRY

#### A. In General

To determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of the subject imports, the Commission first defines the “domestic like product” and the “industry.”<sup>3</sup> Section 771(4)(A) of the Tariff Act of 1930 as amended (“the Act”) defines the relevant industry as the “producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.”<sup>4</sup> In turn, the Act defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation.”<sup>5</sup>

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of “like” or “most similar in characteristics and uses” on a case-by-case basis.<sup>6</sup> No single factor is dispositive, and the Commission may

---

<sup>1</sup>19 U.S.C. §§ 1671b(a) and 1673b(a); *see also American Lamb Co. v. United States*, 785 F.2d 994 (Fed. Cir. 1986); *Calabrian Corp. v. United States*, 794 F. Supp. 377, 381 (Ct. Int’l Trade 1992).

<sup>2</sup>*American Lamb*, 785 F.2d at 1001; *see also Texas Crushed Stone Co. v. United States*, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

<sup>3</sup>19 U.S.C. § 1677(4)(A).

<sup>4</sup>*Ibid.*

<sup>5</sup>*Ibid* at § 1677(10).

<sup>6</sup>*See, e.g., Nippon Steel Corp. v. United States*, 19 CIT \_\_\_, Slip Op. 95-57 at 11 (Apr. 3, 1995). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. *See Nippon Steel* at 11, n.4; *Timken Co. v. United States*, 913 F. Supp. 580, 584 (Ct. Int’l Trade 1996).

consider other factors it deems relevant based on the facts of a particular investigation.<sup>7</sup> The Commission looks for clear dividing lines among possible like products, and disregards minor variations.<sup>8</sup> Although the Commission must accept the determination of Commerce as to the scope of the imported merchandise allegedly subsidized or sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.<sup>9</sup>

## **B. Product Description**

In its notice of initiation, Commerce defined the imported merchandise within the scope of these investigations as:

Flat baked sweet biscuits made from a mixture of ingredients which may include, but are not limited to butter, flour, eggs, and sugar. As defined by the U. S. Food and Drug Administration Compliance Policy Guide 7102.06, Chapter 5, Sec. 505.200, butter cookies are distinguishable from all other cookies in that “all of the shortening ingredient is butter.” The butter cookies covered by these investigations are only those in hard containers (“tins”), which include, but are not limited to, those that are made of metal, and are round, printed with colorful decorative logos and/or pictures, and which have closeable lids.<sup>10</sup>

The imported products subject to these investigations are butter cookies in tins: small, baked confectionery items produced by mixing portions of butter, sugar, flour, eggs, and other flavoring, and then baking. They are distinguished from other cookies on the basis of their shortening ingredient, which, as defined by the U.S. FDA (see above), must only be butter. While butter cookies in general may be packaged in a variety of fashions (*e.g.*, tins, paper bags, plastic tubs, cardboard boxes, trays, or plastic foil), the butter cookies subject to these investigations are carefully packed in small paper cups, tastefully arranged inside elaborate decorative tins, covered with a padded paper insert, and sealed.<sup>11</sup>

## **C. Domestic Like Product and Domestic Industry Issues in These Investigations**

At issue in these investigations is whether to include within the domestic like product certain categories of domestically produced merchandise in addition to that included by Commerce in the scope of its investigations. While petitioner contends that the like product should be coextensive with the scope, respondents argue that the like product should be broadened to include all cookies.

In general, when making a like product determination, I first attempt to identify a domestic product that is “like” the merchandise subject to the scope of the investigation as identified by Commerce, and only in the absence of a product that is “like” the subject merchandise do I attempt to identify a product that is “most

---

<sup>7</sup>*See, e.g.*, S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979).

<sup>8</sup>Torrington Co. v. United States, 747 F. Supp. 744, 748-49 (Ct. Int’l Trade 1990), *aff’d*, 938 F.2d 1278 (Fed. Cir. 1991).

<sup>9</sup>Hosiden Corp. v. Advanced Display Manufacturers, 85 F.3d 1561 (Fed. Cir. 1996) (Commission may find a single like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-752 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

<sup>10</sup>*Initiation of Antidumping and Countervailing Duty Investigations: Butter Cookies in Tins from Denmark*, U.S. Department of Commerce, 63 Fed. Reg. 10822/23 (March 5, 1998).

<sup>11</sup>Confidential Staff Report (“CR”) at I-7 and I-8, Public Staff report (“PR”) at I-7.

similar in characteristics and uses.” Notwithstanding respondents’ reliance on the Commission’s determination in a 1980 investigation involving butter cookies from Denmark,<sup>12</sup> the Commission is not bound by prior determinations concerning the same imported products.<sup>13</sup>

For the reasons discussed below, based on the record in the preliminary phase of these investigations, I find a single domestic like product, butter cookies in tins, consisting of all products corresponding to the scope description. Likewise, I find a domestic industry consisting of the two domestic producers of butter cookies in tins: Maurice Lenell and Little Dutch Boy.

## **1. Physical Characteristics and Uses**

The most prominent physical characteristics of butter cookies in tins, not surprisingly, are the composition of the cookies themselves and the unusual containers which simultaneously serve to protect, preserve, and market the cookies. Neither characteristic is unique in and of itself; however, in combination, they serve to differentiate butter cookies in tins from other cookies.

Under guidelines established by the U.S. FDA, a “butter cookie” must have butter as its sole shortening ingredient, while all other cookies contain either no shortening or some amount of non-butter shortening.<sup>14</sup> The domestic producers typically prepare an assortment of shapes and flavorings of butter cookies which they pack in individual paper holders and sell exclusively in their standard blue and white 16-18 ounce decorated tins.<sup>15</sup> These tins preserve the cookies and extend their shelf life beyond that of cookies sold in other forms of packaging.<sup>16</sup> Other cookies are typically prepared for sale in uniform flavor and size lots and contained within paper or other less-substantial packaging. Even non-butter cookies contained in tins are usually loose packed.<sup>17</sup>

The ultimate “use” for virtually any cookie is as a snack or dessert. However, cookies in tins (including butter cookies) are often purchased as gift items or for decorative purposes. Moreover, butter cookies in tins are primarily seasonal items, manufactured and sold predominantly for the Christmas season, whereas other cookies are sold throughout the year.<sup>18</sup> Although respondents contend that butter cookies in

---

<sup>12</sup>Butter Cookies from Denmark, Inv. No. 701-TA-51 (Final), USITC Pub. 1077 (June 1980).

<sup>13</sup>Nippon Steel, Slip Op. 95-57 at 11; Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1088 (Ct. Int’l Trade 1988).

<sup>14</sup>Respondents allege that petitioner’s “butter cookies” are actually misnamed, because laboratory tests commissioned by respondents presumably show that petitioner’s cookies contain other types of shortening. Conference Transcript at 86-87 (testimony of Mr. Norgaard); Respondents’ Postconference Brief at 7-10. In response, petitioner affirmed that all of its butter cookies are made with 100 percent butter as the shortening, and provided information obtained from independent laboratories indicating that the types of tests conducted by respondents are inherently inaccurate. Conference Transcript at 138-139 (testimony of Mr. W. Cohen); Petitioner’s Postconference Brief at 3, n.5 and Exhibits 2 and 3. Given the clear definition of butter cookies by the U.S. FDA, I do not find cause to dispute the petitioner’s characterization of its product.

<sup>15</sup>CR at I-11, PR at I-10. Maurice Lenell’s 18-ounce tin is the same size as its 16-ounce tin, though it is packed with an additional cup of cookies and is labeled accordingly. CR at I-8, n. 27, PR at I-7, n. 27. Little Dutch Boy sells butter cookies only in 16-ounce tins. CR at V-9, PR at V-6.

<sup>16</sup>CR at I-12, PR at I-10; Conference Transcript at 61 (testimony of Mr. W. Cohen).

<sup>17</sup>CR at I-12, n. 49, PR at I-10, n. 49.

<sup>18</sup>CR at I-13, PR at I-11.

tins are becoming less of a seasonal item,<sup>19</sup> all parties agree that the peak season for butter cookies in tins is the Christmas season.<sup>20</sup>

## **2. Interchangeability**

All types of cookies are interchangeable in the sense that they are baked for the express purpose of being devoured as snack or dessert items. The same could be said of many baked goods. However, cookies in tins are viewed as gift or collectible items.<sup>21</sup> And while all cookies in tins share the positive characteristics associated with the tin packaging, including the value added by the tin and longer shelf life for the cookies, butter cookies and non-butter cookies are packaged in different tins, rather than co-mingled.<sup>22</sup> Petitioner stated that it tried to sell non-butter cookies similar in appearance to butter cookies in gift packaging to compete with butter cookies in tins, but failed at that effort.<sup>23</sup>

## **3. Channels of Distribution**

The predominant channel of distribution for cookies generally (including butter cookies not in tins) is through retail grocery stores.<sup>24</sup> In contrast, cookies in tins (including both butter and non-butter cookies) are sold in a national market, to distributors, retailers and wholesalers such as drug chains, wholesale/warehouse clubs, discount drug chains and mass merchants.<sup>25</sup> Within this broad channel structure, there is evidence of further differentiation: both domestic producers and reporting U.S. importers overwhelmingly sell butter cookies in tins directly to retailers, rather than through distributors.<sup>26</sup>

## **4. Customer and Producer Perceptions**

As discussed above, cookies packed in tins are perceived as gift items. In contrast, cookies (including butter cookies) in other forms of packaging are perceived by customers and producers as common food items and generally would not be considered a suitable gift.<sup>27</sup>

Petitioner indicated that, prior to producing butter cookies in tins, it conducted significant market research, which showed a distinct product and market for butter cookies in tins. According to petitioner, butter cookies sold in the distinctive blue tins are perceived as seasonal items, generally given as gifts during the Christmas season.<sup>28</sup> While Little Dutch Boy did not comment on this factor, it too packages its butter

---

<sup>19</sup>Conference Transcript at 105 (testimony of Mr. Norgaard).

<sup>20</sup>Petitioner's Postconference Brief at 13-15; Conference Transcript at 114 (testimony of Mr. Norgaard). *See also* the volume of shipments to retailers in the fourth quarters of 1995, 1996, and 1997 by U.S. producers and importers. Table V-1, CR at V-12, PR at V-9.

<sup>21</sup>CR at I-9 and I-11, PR at I-8 and I-10.

<sup>22</sup>Public Meeting Transcript at 7 (testimony of Mr. Eninger).

<sup>23</sup>Petitioner's Postconference Brief at 16, Conference Transcript at 23 (testimony of Mr. T. Cohen).

<sup>24</sup>CR at I-14 and III-6-III-7, PR at I-12 and III-5.

<sup>25</sup>CR at I-13, PR at I-12.

<sup>26</sup>CR at II-2, PR at II-2. *See also* Petitioner's Postconference Brief at 19.

<sup>27</sup>CR at I-13, PR at I-11.

<sup>28</sup>Petitioner's Postconference Brief at 20.



cookies in a traditional blue tin.<sup>29</sup> Respondents suggested that their cookies are becoming less of a seasonal item, although they conceded that the large majority of sales occur in the last quarter of the calendar year.<sup>30</sup>

## **5. Common Manufacturing Facilities, Production Processes, and Production Methods**

At the baking stage, butter cookies and non-butter cookies are produced at the same facilities, on the same production lines, and using the same processes, equipment, and employees. However, packaging butter cookies requires several times more labor than baking butter cookies,<sup>31</sup> and it is at the packaging stage that distinctions between butter cookies in tins and other cookies emerge. The packaging of butter cookies in tins is often more labor intensive than the packaging of other types of cookies, even non-butter cookies packaged in tins. Butter cookies are hand packaged into paper cups and tins using specially trained labor, whereas most other cookies are mechanically inserted into their containers or otherwise require no specialized labor.<sup>32</sup>

## **6. Price**

The prices of cookies fluctuate widely depending upon a variety of factors, not the least of which is brand recognition.<sup>33</sup> However, at the retail level, the record indicates that there exist particular “price points” at which butter cookies in tins tend to be sold (*e.g.*, \$2.99 or 2 for \$5.00 price points for butter cookies in a 1-pound tin).<sup>34</sup>

## **7. Conclusion**

Applying the traditional six-factor analysis, for purposes of the preliminary phase of these investigations I find the like product to be coextensive with the scope of these investigations, based on differences in customer and producer perceptions, channels of distribution, pricing practices, and specific uses, as well as the additional, specialized labor and the particular physical characteristics attributable to the use of the tin container. I find that these factors outweigh the degree of interchangeability existing between butter cookies in tins and other cookies based on a commonality of general uses and the overlap in terms of manufacturing facilities, production processes, and production methods at the baking stage of production. Therefore, I find a domestic industry consisting of the two domestic producers of butter cookies in tins: Maurice Lenell and Little Dutch Boy.

---

<sup>29</sup>Conference Transcript at 128 (testimony of Mr. Berry).

<sup>30</sup>Conference Transcript at 114 (testimony of Mr. Norgaard).

<sup>31</sup>Public Meeting Transcript at 5-7 (testimony of Mr. Eninger and Mr. Fischer). Maurice Lenell reported that the cost of bakery labor accounted for \*\*\* per pound of butter cookies in tins produced in 1997, while the cost of packing labor accounted for a significantly higher amount, \*\*\* per pound. CR at VI-9, PR at VI-4.

<sup>32</sup>Even other cookies packaged in tins are, for the most part, loose packed, requiring no special labor. *See, e.g.*, CR at I-8, n. 32, PR at I-7, n. 32, describing packaging operations at Maurice Lenell. Approximately \*\*\* percent of Lenell’s “holiday bear” tins, which contain an assortment of vegetable shortening cookies, are loose packed. CR at I-11, n. 49, PR at I-10, at n. 49.

<sup>33</sup>For example, Pepperidge Farm’s average price per pound of its butter cookies in bags is \*\*\* percent higher than the average price per pound of U.S.-produced butter cookies in tins. CR at V-8, PR at V-6.

<sup>34</sup>CR at I-14, PR at I-12. There does not appear to be a corresponding price point for butter cookies in tins at the wholesale level. *Ibid.*

### III. NO REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF ALLEGEDLY SUBSIDIZED AND LTFV IMPORTS

In preliminary investigations, the Commission determines whether there is a reasonable indication that an industry in the United States is materially injured by reason of the imports subject to investigation.<sup>35</sup> The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.”<sup>36</sup> In making this determination, the Commission must consider the volume of imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.<sup>37</sup> Although the Commission may consider causes of injury to the industry other than the allegedly subsidized and LTFV imports,<sup>38</sup> it is not to weigh causes.<sup>39</sup>

In assessing whether there is a reasonable indication that the domestic industry is materially injured by reason of the subject imports, the Commission considers all relevant economic factors that bear on the state of the industry in the United States.<sup>40</sup> These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>41</sup>

For the reasons discussed below, I determine that there is no reasonable indication that the domestic industry producing butter cookies in tins is materially injured by reason of allegedly subsidized and LTFV imports from Denmark.

#### A. Conditions of Competition

I find several conditions of competition relevant to my analysis in these investigations. First, I note that imports of Danish butter cookies in tins have had a significant presence in the U.S. market for a number of years, while Maurice Lenell and Little Dutch Boy are relatively new to high-volume, commercial

---

<sup>35</sup> 19 U.S.C. §§ 1671b(a)(1) and 1673b(a).

<sup>36</sup> 19 U.S.C. § 1677(7)(A).

<sup>37</sup> 19 U.S.C. § 1677(7)(B)(i). The Commission “may consider such other economic factors as are relevant to the determination,” but shall “identify each [such] factor . . . and explain in full its relevance to the determination.” 19 U.S.C. § 1677(7)(B).

<sup>38</sup> Alternative causes may include the following:

[T]he volume and prices of imports sold at fair value, contraction in demand or changes in patterns of consumption, trade, restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry.

S. Rep. No. 249, 96th Cong., 1st Sess. 74 (1979). Similar language is contained in the House Report. H.R. Rep. No. 317, 96th Cong., 1st Sess. 46-47 (1979).

<sup>39</sup> See, e.g., Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1101 (Ct. Int'l Trade 1988).

<sup>40</sup> 19 U.S.C. § 1677(7)(C)(iii).

<sup>41</sup> *Ibid.*

production of butter cookies in tins.<sup>42</sup> I also note that while domestically produced and Danish butter cookies in tins are similar in appearance and quality, competition for customers (primarily mass merchandise chain stores) is affected by the absence of U.S.-produced butter cookies in tins in sizes greater than 18 ounces.<sup>43</sup>

Furthermore, butter cookies in tins are a seasonal product, with a large majority of sales occurring in the fourth quarter of each calendar year, and are often bought as Christmas gifts. There is some evidence, however, that this seasonality may be diminishing with the growth of mass merchandise chain stores, where butter cookies in tins are offered for sale year-round.<sup>44</sup>

Finally, the butter content in butter cookies is significant and the cost relative to other forms of shortening and to other ingredients in butter cookies is high and subject to noticeable fluctuations.<sup>45</sup> The parties agree that fluctuations in the price of butter can have a major impact on the cost structure for producing butter cookies in tins.<sup>46</sup>

## **B. Volume of Subject Imports**

On balance, I find that the volume and the increase in the volume of imports of butter cookies in tins from Denmark was significant between 1995 and 1997. While U.S. consumption of butter cookies in tins increased over the period examined, the growth in U.S. imports of the subject merchandise outstripped the rise in consumption.<sup>47</sup> The quantity of subject imports fell from \*\*\* pounds in 1995 to \*\*\* pounds in 1996, then rose to \*\*\* pounds in 1997, a net increase of \*\*\* percent over the period examined. The value of subject imports fell from \*\*\* in 1995 to \*\*\* in 1996, then rose to \*\*\* in 1997, a net increase of \*\*\* percent over the period examined.<sup>48</sup>

The market share of U.S. shipments of subject imports, by quantity, fell from \*\*\* percent in 1995 to \*\*\* percent in 1996, then recovered to \*\*\* percent in 1997, for a net increase of \*\*\* percentage points. The market share of U.S. shipments of subject imports, by value, fell from \*\*\* percent in 1995 to \*\*\* percent in 1996, then recovered to \*\*\* percent in 1997, for a net increase of \*\*\* percentage points. In contrast, the domestic industry's market share by quantity increased from \*\*\* percent in 1995 to \*\*\* percent in 1996, then decreased to \*\*\* percent in 1997, a net decline of \*\*\* percentage points during 1995-97. Market shares by value followed a similar, though less pronounced, trend, resulting in a net decrease of \*\*\* percentage points.<sup>49</sup>

---

<sup>42</sup>Conference Transcript at 113 (testimony of Mr. Norgaard); CR at III-3-III-6, PR at III-2-III-4.

<sup>43</sup>CR at II-7-II-9, PR at II-5-II-6. Only \*\*\* percent of the sales of the largest importer of butter cookies in tins from Denmark, Kelsen, were in 16 ounce tins. CR at II-7, PR at II-5.

<sup>44</sup>Conference Transcript at 105 (testimony of Mr. Norgaard).

<sup>45</sup>The butter content of butter cookies is 26-32 percent. The cost per pound of butter is reportedly several times the cost of vegetable shortening and sugar, and can range from \$0.70 per pound to \$1.40 per pound. Conference Transcript at 63 and 66 (testimony of Mr. W. Cohen).

<sup>46</sup>Conference Transcript at 66 and 67 (testimony of Mr. W. Cohen); Petition at 28; Respondents' Postconference Brief at 22.

<sup>47</sup>*Compare*, Tables IV-1, CR at IV-3, PR at IV-2 with Table IV-3, CR at IV-6, and PR at IV-5.

<sup>48</sup>Table IV-1, CR at IV-3, PR at IV-2. According to Commission questionnaire responses, imports of butter cookies in tins from Denmark accounted for no less than 99 percent of total imports in any given year during the period examined. Consequently, I find that the subject imports should not be deemed negligible.

<sup>49</sup>Tables IV-3 and IV-4, CR at IV-6 and IV-8, PR at IV-5 and IV-7.

Based on the rising volume and market share of the subject imports over the period examined as a whole, as well as their displacement of domestic production in 1997,<sup>50</sup> I find both the volume of subject imports and the increase in that volume over the period examined to be significant.

### **C. Price Effects of Subject Imports**

On balance, I find that there has not been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and that the subject imports have not depressed prices to a significant degree or prevented price increases, which otherwise would have occurred, to a significant degree. At the outset, I note two facts about the companies that comprise the domestic industry producing butter cookies in tins. First, the petitioner, Maurice Lenell, entered the market by offering a greater volume of tinned product at a lower price than its Danish competitors, then in 1997, the company both reduced the weight of its tinned product and increased its price to purchasers.<sup>51</sup> Second, Little Dutch Boy sold butter cookies in tins to \*\*\*, at a \*\*\* throughout the period examined.<sup>52</sup> I find that these company-specific facts help to place the industry-wide data in perspective.

The Commission collected quarterly pricing data on butter cookies in 16- and 18-ounce tins sold to retail stores. The Danish product oversold the domestic product throughout the 9 quarters of 1995, 1996, and first quarter 1997 by an average of 32.6 percent. During the last 3 quarters of 1997, the imported product undersold the domestic product by an average of 4.4 percent.<sup>53</sup>

The price trend for the Danish product was generally stable, though drifting upward, through the first quarter of 1997, then falling from \*\*\* per pound to \*\*\* per pound in the second quarter and \*\*\* per pound in the third and fourth quarters. The price trend for the domestic product drifted upward through the first quarter of 1997, rising from \*\*\* per pound to \*\*\* per pound (but reaching \*\*\* per pound in the fourth quarter of 1996). In the second quarter of 1997, small volumes of domestic product reached \*\*\* per pound,<sup>54</sup> what had been a comparable level with the Danish product, before falling to \*\*\* per pound in the third and fourth quarters.<sup>55</sup>

Given that the price of U.S. product increased irregularly through the second quarter of 1997, before declining to a level still well above 1995 prices, I find no evidence of price depression. Likewise, a finding of price suppression would be difficult to reconcile with petitioner's expressed strategy to undersell its Danish

---

<sup>50</sup>Nonsubject imports of butter cookies in tins declined throughout the period examined, both absolutely and as a share of apparent consumption. *Ibid.* Accordingly, subject imports displaced both the domestic and the nonsubject imported product from the U.S. market.

<sup>51</sup>Conference Transcript at 15-16 (testimony of Mr. Levine).

<sup>52</sup>Table VI-2, CR at VI-4-VI-6, PR at VI-2.

<sup>53</sup>Table V-1, CR at V-12, PR at V-9.

<sup>54</sup>As noted earlier, in 1997 Maurice Lenell both increased the unit price per tin and reduced the volume of cookies per tin from 18 to 16 ounces. This action is reflected in the abrupt upward movement in price by the domestic product in 1997 (measured in price per pound).

<sup>55</sup>Table V-1, CR at V-12, PR at V-9. I note that the Petitioner reported detailed lost sales and lost revenue allegations for the period 1995-97, while Little Dutch Boy was unable to provide any details to substantiate its allegations during the period examined. Despite staff efforts, none of the allegations could be verified, due to the inability or the unwillingness of purchasers to provide the necessary information. CR at V-13-V-15, PR at V-10-V-11. Were there to be a final phase of these investigations, I would surely have requested an in-depth exploration of the allegations by means of detailed purchaser questionnaires, backed with the force of subpoenas.

competition, at least until 1997. In 1996, when the cost to U.S. producers for butter soared,<sup>56</sup> Danish prices remained stable at \*\*\* per pound, always at least \*\*\* higher than domestic prices.<sup>57</sup> Even in 1997, when Danish prices dipped, they appear to have fallen only to meet U.S. prices. In light of the evidence of limited underselling, both in terms of frequency and magnitude, and increases in prices for the domestic like product (and, for most of the period examined, the subject imports as well), I find that imports of butter cookies in tins from Denmark have not depressed prices to a significant degree or prevented price increases, which otherwise would have occurred, to a significant degree.

#### **D. Impact of Subject Imports**

After evaluating (within the context of the business cycle and conditions of competition that are distinctive to the affected industry) all relevant economic factors which have a bearing on the state of the industry in the United States, I do not find that the subject imports are having a significant adverse impact on the domestic industry.<sup>58</sup>

U.S. production of butter cookies in tins rose from \*\*\* pounds in 1995 to \*\*\* pounds in 1996, then fell to \*\*\* pounds in 1997, a net decrease of \*\*\* percent during the period examined. Capacity utilization increased \*\*\* percent to \*\*\* percent between 1995 and 1996, then fell to \*\*\* percent in 1997, a net decline of \*\*\* percentage points.<sup>59</sup>

The volume of U.S. producers' commercial shipments of butter cookies in tins increased from \*\*\* pounds in 1995 to \*\*\* pounds in 1996, then fell to \*\*\* pounds in 1997, a net decrease of \*\*\* percent. However, the value of U.S. producers' commercial shipments of butter cookies in tins increased from \*\*\* in 1995 to \*\*\* in 1996, then fell to \*\*\* in 1997, resulting in a net increase of \*\*\*. Moreover, the average unit value of these commercial shipments increased steadily during the period examined, rising from \*\*\* per pound in 1995 to \*\*\* in 1996 and \*\*\* in 1997, a net increase of \*\*\* percent.<sup>60</sup>

End-of-period inventories of butter cookies in tins held by U.S. producers rose from \*\*\* pounds in 1995 to \*\*\* pounds in 1996, then fell sharply to only \*\*\* pounds in 1997. As a ratio to production and

---

<sup>56</sup>Conference Transcript at 64 (testimony of Mr. T. Cohen).

<sup>57</sup>Table V-1, CR at V-12, PR at V-9.

<sup>58</sup>As part of its consideration of the impact of imports, the statute as amended by the Uruguay Round Agreements Act (URAA) specifies that the Commission is to consider "the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V). The SAA indicates that the amendment "does not alter the requirement in current law that none of the factors which the Commission considers is necessarily dispositive in the Commission's material injury analysis." SAA at 850. New section 771(35)(C), 19 U.S.C. § 1677(35)(C), defines the "margin of dumping" to be used by the Commission in a preliminary determination as the margin or margins published by Commerce in its notice of initiation. In these investigations, although petitioner alleged dumping margins ranging from 42 to 83 percent, Commerce did not identify the magnitude of estimated dumping margins. Given that Commerce has not provided estimated margins, I do not have a solid basis upon which to consider the margins. In any event, I do not ordinarily consider the subsidy or dumping margins to be of particular significance in evaluating the effects of subject imports on domestic producers. See Separate and Dissenting Views of Commissioner Lynn M. Bragg in Bicycles from China, Inv. No. 731-TA-731 (Final), USITC Pub. 2968 (June 1996).

<sup>59</sup>Table III-1, CR at III-9, PR at III-7. I note, however, that the domestic industry's reported capacity of \*\*\* pounds is based on their overall capacity to produce cookies. I therefore place little weight on the capacity utilization data derived from these capacity figures.

<sup>60</sup>Table III-2, CR at III-11, PR at III-9.

shipments, such inventories remained stable between 1995 and 1996 at \*\*\* percent, then declined to \*\*\* percent in 1997.<sup>61</sup>

The number of production and related workers remained stable between 1995 and 1996, then declined from \*\*\* to \*\*\* in 1997. Both the hours worked by, and the wages paid to, these workers increased between 1995 and 1996, then decreased between 1996 and 1997, but reflected a net increase over the period examined (although hourly wages decreased over the period examined). Productivity fell, and unit labor costs rose, throughout the period examined.<sup>62</sup>

Capital expenditures by the one reporting domestic producer, Maurice Lenell, declined throughout the period examined, falling from \*\*\* in 1995 to \*\*\* in 1996 and \*\*\* in 1997. Research and development expenditures declined from \*\*\* in 1995 to \*\*\* in 1996 and 1997.<sup>63</sup>

Other financial indicators dipped between 1995 and 1996, as cost-related effects (notably the rising cost of butter) more than offset growth in the volume, value, and unit value of net sales. However, this situation was reversed in 1997, as higher unit sales values (despite lower overall sales levels) and lower unit SG&A costs overshadowed a slight increase in unit COGS. Gross profit fell from \*\*\* in 1995 to \*\*\* in 1996, then rose to \*\*\* in 1997. Operating losses worsened from \*\*\* in 1995 to \*\*\* in 1996, then improved noticeably to \*\*\* in 1997. Cash outflow expanded from \*\*\* in 1995 to \*\*\* in 1996, then contracted to \*\*\* in 1997.<sup>64</sup>

The domestic industry earned \*\*\* less gross profits in 1996 concurrent with gaining market share at the expense of the Danish importers, and earned \*\*\* more in gross profits in 1997 concurrent with losing market share at the expense of the Danish importers. Likewise, the domestic industry lost \*\*\* more at the operating income level while gaining market share in 1996, and lost \*\*\* less while surrendering market share in 1997. The domestic industry's cash flow worsened by \*\*\* between 1995 and 1996, but improved by \*\*\* between 1996 and 1997.<sup>65</sup> These trends do not support the conclusion that subject imports have adversely affected the domestic industry's financial condition.

Based on the foregoing, I am unable to find that the significant volume of subject imports is affecting adversely the prices charged, or revenue received, by the domestic industry. Accordingly, I find no reasonable indication that the domestic industry is materially injured by reason of the subject imports.

#### **IV. REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF ALLEGEDLY SUBSIDIZED AND LTFV IMPORTS**

For the purposes of determining whether there is a reasonable indication that a U.S. industry is threatened with material injury by reason of the subject merchandise, Section 771(7)(F) of the Act lists a number of factors for the Commission to consider.<sup>66</sup> While an analysis of the statutory threat factors necessarily involves projection of future events, “[s]uch a determination may not be made on the basis of

---

<sup>61</sup>Table III-3, CR at III-13, PR at III-11.

<sup>62</sup>Table III-4, CR at III-13, PR at III-11.

<sup>63</sup>Table VI-4, CR at VI-11, PR at VI-5.

<sup>64</sup>Table VI-1, CR at VI-3, PR at VI-2.

<sup>65</sup>Tables IV-4 and VI-1, CR at IV-8 and VI-3, PR at IV-7 and VI-2.

<sup>66</sup>19 U.S.C. § 1677(7)(F)(ii); *see* 19 U.S.C. §§ 1671b(a), 1673b(a).

mere conjecture or supposition.”<sup>67</sup> In these investigations, the Commission must consider, in addition to other relevant economic factors, the following statutory factors in its threat analysis:

- (I) if an countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Appendix), and whether imports of the subject merchandise are likely to increase,
- (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
- (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
- (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices and are likely to increase demand for further imports,
- (V) inventories of the subject merchandise,
- (VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,
- (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product, and
- (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).<sup>68</sup>

Further direction is provided by the amendment to Section 771(7)(F)(ii), which adds that the Commission consider the threat factors “as a whole” in making its determination “whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur” unless an order issues.<sup>69</sup> In addition, the Commission must consider whether dumping findings or antidumping remedies in markets of foreign countries against the same class of merchandise suggest a threat of material injury to the domestic industry.<sup>70</sup>

#### **A. Statutory Threat Factors**

---

<sup>67</sup>19 U.S.C. § 1677(7)(F)(ii); *see, e.g.*, S. Rep. No. 249 at 88-89; *see also* Metallverken Nederland B.V. v. United States, 744 F. Supp. 281, 287 (Ct. Int'l Trade 1990).

<sup>68</sup>19 U.S.C. § 1677(7)(F)(I). Factor VII is inapplicable because these investigations do not involve a raw agricultural product, as defined in 19 U.S.C. § 1677(4)(E)(iv).

<sup>69</sup>19 U.S.C. § 1677(7)(F)(ii).

<sup>70</sup>19 U.S.C. § 1677(7)(F)(iii)(I). There are no such findings relevant to these investigations.

## **1. Nature of the Subsidies**

Commerce initiated an investigation of the following alleged subsidy programs: (1) *European Union Program*: Export Restitution Payments on Butter, Sugar, and Wheat Flour; (2) *Government of Denmark Programs*: Export Credit and Insurance Program, Export Training Program, and Assistance for Export Groups. Commerce provided no further information as to the nature of these alleged subsidies in its notice of initiation.<sup>71</sup>

Petitioner alleges that the EU Export Restitution program is an export subsidy, *i.e.*, a subsidy described in Article 3 of the Subsidies Appendix.<sup>72</sup> Respondents admit the existence of the EU subsidy program, but argue that these subsidies have been reduced during the last two years. Respondents deny that they receive export subsidies from the Government of Denmark.<sup>73</sup>

---

<sup>71</sup>*Initiation of Antidumping and Countervailing Duty Investigations: Butter Cookies in Tins from Denmark*, U.S. Department of Commerce, 63 Fed. Reg. 10824 (March 5, 1998).

<sup>72</sup>Petitioner's Postconference Brief at 49.

<sup>73</sup>Respondents' Postconference Brief at 17.



## **2. Foreign Production Capacity**

While overall capacity declined between 1995 and 1997, there is significant existing unused capacity in Denmark, exceeding the total volume of butter cookies in tins sold in the United States in 1997. Other export markets are available to absorb additional exports, but the United States became Denmark's largest export market in 1997 and is projected to remain the largest in 1998 and 1999.<sup>74</sup>

## **3. Volume and Market Penetration of Subject Imports**

As I noted earlier in my discussion of the volume of the subject imports in the context of present material injury, I find that the volume and the increase in the volume of imports of butter cookies in tins from Denmark was significant between 1995 and 1997. The quantity of subject imports increased by \*\*\* percent over the period examined, and the quantity market share increased by \*\*\* percentage points. Over the same period, the value of subject imports increased by \*\*\* percent and the market share increased by \*\*\* percentage points.<sup>75</sup> Exports of Danish butter cookies in tins to the United States decreased from \*\*\* pounds in 1995 to \*\*\* pounds in 1996, then increased sharply to nearly \*\*\* pounds in 1997, and are projected to increase further in 1998 and 1999.<sup>76</sup>

I find that the significant rate of increase of the volume and market share of imports of the subject merchandise, together with the existence of unused foreign production capacity and the primacy of the U.S. export market to Danish producers, indicates the likelihood of substantially increased imports.

## **4. Likely Price Effects of Subject Imports**

As I noted earlier in my discussion of the price effects of the subject imports in the context of present material injury, I find that there has not been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and that the subject imports have not depressed prices to a significant degree or prevented price increases, which otherwise would have occurred, to a significant degree. However, the noticeable decline in selling price as well as the underselling of Danish butter cookies in tins that did take place during the period examined occurred during the last three quarters of 1997.<sup>77</sup> Further, Little Dutch Boy \*\*\*, reportedly by reason of lower-priced butter cookies in tins from

---

<sup>74</sup>Table VII-1, CR at VII-4, PR at VII-4. I note that respondents suggest that capacity utilization data may be affected by the seasonal nature of butter cookie production: it is normal, according to respondents, for production to be lower in the first half of the year, only to pick up in the second half to meet the Christmas rush. Respondents also state that their sales in Asia are mostly to Hong Kong and China, and have not been affected by the economic troubles in East Asia. Respondents' Postconference Brief at 20-21.

<sup>75</sup>Tables IV-2 and IV-4, CR at IV-4 and IV-8, PR at IV-3 and IV-7.

<sup>76</sup>Table VII-1, CR at VII-4, PR at VII-4. I note that respondents argue that over the longer term (the last ten years) Danish exports of butter cookies in tins to the United States have declined. Respondents' Postconference Brief at 10.

<sup>77</sup>Table V-1, CR at V-12, PR at V-9.

Denmark.<sup>78</sup> Based on these events, I find a reasonable indication that adverse price effects would likely occur unless orders were issued.<sup>79</sup>

## **5. Inventories of Subject Merchandise**

End-of-period inventories of the subject merchandise held in Denmark nearly doubled between 1995 and 1997, rising from \*\*\* pounds in 1995 to \*\*\* pounds in 1996 and to \*\*\* pounds in 1997. Danish inventories are projected to decline in 1998 and 1999.<sup>80</sup> I note, however, that production is projected to exceed total shipments in both 1998 and 1999, a situation that would normally imply an *increase* in inventories. Moreover, end-of-period inventories of the subject merchandise held in the United States more than doubled between 1995 and 1997, rising from \*\*\* pounds in 1995 to \*\*\* pounds in 1996 and to over \*\*\* pounds in 1997.<sup>81</sup>

## **6. Potential for Product Shifting**

Each of the four reporting Danish producers currently use production facilities to produce cookies other than butter cookies in tins, and therefore the potential for product shifting exists.<sup>82</sup>

## **7. Negative Effects on Development and Production Efforts**

Petitioner states that without protection under the antidumping and/or countervailing duty law, \*\*\* in 1998. Little Dutch Boy reports that it \*\*\*.<sup>83</sup> Based on these representations, which I find credible in light of the production and financial data reported by the domestic industry, I find a reasonable indication of potential negative effects on the development and production efforts of the relatively newly-fledged domestic industry.

## **8. Other Demonstrable Adverse Trends**

The Danish industry is almost completely dependent on export shipments; its home market sales account for only \*\*\* percent of its total shipments.<sup>84</sup> It is therefore unlikely that any significant portion of the butter cookies in tins shipped by the newest producer in Denmark will be to the home market.<sup>85</sup> Rather, such

---

<sup>78</sup>CR at III-5, PR at III-4. Little Dutch Boy accounted for \*\*\* percent of the U.S. industry's net sales of butter cookies in tins in 1997, and was the only company to report \*\*\* during the period examined. Table VI-2, CR at VI-4-VI-6, PR at VI-2. By another calculation, Little Dutch Boy accounted for \*\*\* percent of commercial U.S. shipments in 1997. Table III-2 and Figure III-4, CR at III-11 and III-12, PR at III-9 and III-10. I note that this allegation, which I find threatening to the industry as a whole if accurate, has not been independently confirmed by \*\*\*.

<sup>79</sup>I note that Kelsen predicts a price increase of at least 15 percent in 1998, due to higher butter prices, increases in other costs, and decreases in EU subsidies. Respondents' Postconference Brief at 22. However, the importer that retains \*\*\*, not Kelsen. Compare CR at VII-6, PR at VII-6 with CR at II-3, PR at II-2.

<sup>80</sup>Table VII-1, CR at VII-4, PR at VII-4.

<sup>81</sup>Table VII-2, CR at VII-7, PR at VII-6.

<sup>82</sup>CR at VII-3-VII-7, PR at VII-3-VII-6, as revised by OINV Memorandum INV-V-014.

<sup>83</sup>CR at E-4, PR at E-3.

<sup>84</sup>Table VII-1, CR at VII-4, PR at VII-4.

<sup>85</sup>See the testimony of Mr. Norgaard ("And interestingly enough, we are actually seeing a new competitor building a plant in Denmark today."). Conference Transcript at 99.

shipments will be produced in large part for export, and, as noted previously, the largest single export market for Danish butter cookies in tins is the United States.<sup>86</sup>

### **CONCLUSION**

For the foregoing reasons, I determine that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of butter cookies in tins from Denmark that allegedly are subsidized and sold in the United States at less than fair value.

---

<sup>86</sup>Table VII-1, CR at VII-4, PR at VII-4.